

**The Foreign Corrupt Practices Act:
Coping with Heightened Enforcement
Risks**

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***The Nuts and Bolts of Conducting
an FCPA Internal Investigation***

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Introduction

2007 marked the 30th anniversary of the enactment of the Foreign Corrupt Practices Act (“FCPA”). Spurred by shocking disclosures of bribes by scores of prestigious U.S. corporations doing business overseas that came out during the Watergate hearings, Congress had moved to prohibit the payment of bribes to foreign officials for the purpose of obtaining or retaining business. As part of the FCPA, Congress also significantly expanded the accounting provisions of federal securities laws in order to deter companies from concealing illegal payments on their books

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and records. Right now, the Foreign Corrupt Practices Act is a very hot topic, with the Department of Justice and Securities and Exchange Commission bringing a record number of prosecutions and enforcement actions under the Act, increasing the resources dedicated solely to enforcement of the Act, and reporting record-breaking penalties assessed under the Act.

There are scores of examples of major foreign and U.S. corporations such as Lucent Technologies, Baker Hughes, the Willbros Group, Siemens AG, Aon, and Paradigm B.V. who have disclosed that they are the target of a FCPA investigation or have paid a fine to settle allegations related to the Act. It is crucial that domestic corporations engaged in doing business abroad and foreign corporations that are traded on U.S. exchanges design and implement effective compliance programs to guard against becoming part of those statistics. In the course of conducting such compliance programs, information may come to light that justifies the company's initiating an internal investigation by its lawyers to determine whether an FCPA problem exists. This paper addresses the nuts and bolts of conducting an FCPA internal investigation.

An Overview of the FCPA

The Foreign Corrupt Practices Act, which has been twice amended since its original enactment in 1977,¹ includes two principal parts: the antibribery provisions and the accounting requirements. The Act is applicable to any U.S. company, citizen, or resident alien, as well as any foreign

¹ Pub. L. No. 95 213, 91 Stat. 1494 (1977), as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100 418, tit. V, §§ 5001 03, 102 Stat. 1415 (1988), and the International Anti Bribery and Fair Competition Act of 1998, Pub.L. No: 105 366 (1998) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff).

company that is traded on a U.S. exchange or has its principal place of business in the U.S.² In addition, the Act applies to officers, directors, employees, and agents of such foreign companies. A company is liable for the acts of its subsidiaries (both foreign or domestic) as well as conduct by third parties of which the company is aware (for example, the Act prohibits payments to a third party such as an agent or vendor if the company knows that the third party will use such funds to make a payment that is prohibited by the Act). Both the Department of Justice and the Securities and Exchange Commission enforce the FCPA, therefore, a company is vulnerable to concurrent investigations and can be liable for both civil and criminal penalties.

1. The Antibribery Provisions

Under the FCPA's antibribery provisions, it is a crime for issuers, domestic concerns, foreign persons in the U.S., or U.S. persons:

- (1) "corruptly"
- (2) to make "an offer, payment, ... or authorization of the payment of" money or anything else of value
- (3) "to ... any foreign official"
- (4) for the purpose of "influencing any act or decision of such foreign official in his official capacity ... or securing any improper advantage"
- (5) in order to "assist" such firm or person "in obtaining or retaining business for or with, or directing business to, any person."

The definition of "foreign official" includes not only elected or appointed government employees and officials but also any employee of a government-owned business. The Act's prohibition against payments to a foreign official also

² Note that the Act's Accounting Provisions are only applicable to issuers. See below.

applies to a payment to any foreign political party, party official, candidate for foreign political office, or official of a public international organization (such as the World Bank or WTO, but not the International Olympic Committee). In addition, as noted previously, the Act also prohibits payments to a third party who in turn makes or offers to make a payment to a foreign official when the initial payment is made with the knowledge that the subsequent payment or offer to pay to the foreign official will be made.

A violation of the FCPA's antibribery provisions can result in criminal liability for individual officers, directors, or agents, and fines for the company. The criminal penalties are:

- A fine up to \$2 million per violation and a civil penalty up to \$10 million for corporations;³ and
- A fine of \$100,000 or more⁴ and/or 5 years in prison and a civil penalty up to \$10,000 for individuals.

Note that fines imposed on individuals may not be paid by their employers or principals.

2. The Accounting Provisions

The accounting requirements of the FCPA apply only to "issuers" and have been incorporated into section 13 of the Securities Exchange Act of 1934.⁵ Under such provisions, every issuer must:

³ Under the Alternative Fines Act (18 U.S.C. § 3571(d)), the fine may be increased up to twice the benefit that the defendant sought to obtain by making the corrupt payment.

⁴ A fine of up to \$250,000 may be imposed on an individual under 18 U.S.C. § 3571(b).

⁵ See 15 U.S.C. § 78m(b)(2)-(5).

(1) “make and keep books, records, and accounts, which, in *reasonable detail*, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;”⁶ and,

(2) “devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances*” that certain specified objectives are attained.⁷

Note that these accounting requirements are not linked to foreign bribery, nor even domestic bribery. Records are not “accurate” and may be found to violate the Act if they fail to reflect any illegal or improper transactions, or falsify or disguise any such transactions. They cover not only bribery, but all false entries, including manipulation of sales, earnings, or other financial data, illegal political contributions, income tax fraud, and insider self-dealing.

Any person that knowingly circumvents or knowingly fails to implement a system of internal accounting controls or knowingly falsifies any book, record, or account described in

⁶ Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)) (emphasis added).

⁷ Section 13 (b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)) (emphasis added). The system must provide reasonable assurances that: “(i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) 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.”

the FCPA may be held criminally liable.⁸ Congress did not include specific sanctions for violations of the accounting provisions. Rather, the general enforcement remedies of the Exchange Act are applicable.

Any person who willfully violates the FCPA books and records provisions or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed in violation of those provisions can be held criminally liable. The criminal penalties are:

- A fine of not more than \$5,000,000 or imprisoned not more than 20 years, or both, except
- When the violation is made by an issuer rather than a natural person, a fine not exceeding \$25,000,000 may be imposed. ⁹ A greater penalty may be imposed under the federal Alternative Fines Act, however, which provides that the monetary fine may be up to twice the benefit that the defendant sought to obtain through the violation.¹⁰

Internal Investigations

As a result of the company's routine compliance program, it may choose to conduct its own investigation in anticipation of a government probe or potential private litigation, or simply as a company-initiated effort to investigate potential problems, rectify any that are

⁸ Sections 13(b)(4), (5) of the Exchange Act (15 U.S.C. § 78m(b)(4), (5)).

⁹ Section 13(u) of the Exchange Act (15 U.S.C. § 78u). Congress did not include specific sanctions for violations of the accounting provisions. Rather, the general enforcement remedies of the Exchange Act are applicable.

¹⁰ 18 U.S.C. § 3571(d).

discovered, and take steps to prevent a repetition of the conduct in the future. The following are some basic issues for counsel to consider when faced with a potential compliance issue, including a request to conduct an internal investigation.

1. The Objectives

To be of any benefit to the company, an internal investigation must be thorough, balanced, and conducted with the intent to uncover the truth. Although this may seem like an obvious proposition, the natural inclination of some companies, including their counsel, who are trained advocates, can be to “spin” the investigation in an attempt to exonerate the company, or at the very least to place its conduct in the best possible light. Of course, any reports that are generated as a result of the internal investigation should include exculpatory and mitigating information, to the extent available. But an investigation that skews or misrepresents facts will get the company nowhere, particularly insofar as the government is concerned.

Prosecutors and agency officials have made very clear that a purported internal “investigation” that is slipshod or otherwise inadequate will not be viewed favorably and, in fact, might suggest that the company has something to hide, prompting the government to investigate even more thoroughly and to view with skepticism any representations made by the company or its counsel. One of the purposes of a properly conducted internal investigation is to demonstrate to the government that its involvement is unnecessary because the company will proceed expeditiously to investigate and extirpate any wrongdoing. An improperly conducted investigation will have the opposite effect.

2. Authorizing and Conducting the Investigation

Internal investigations can be authorized by a number of sources in the corporation, including the Board, officers (including in-house counsel), or special committees, such as

the audit committee. Deciding who should authorize, oversee, and conduct the investigation will depend upon the potential seriousness of the matter being investigated.

To the extent potential wrongdoing by high-level officers or directors is suspected, or the government already is or may become involved, or the matter involves significant amounts of money or could have a serious impact on shareholders, the internal investigation should be authorized and overseen by a special committee consisting of outside directors. That special committee should retain its own, independent counsel (separate from in-house or outside counsel for the company) with extensive criminal and/or agency experience and, ideally, who have not previously been retained by the company on other matters. Under those circumstances, retained counsel represents the special committee, not the company. The government may consider investigations overseen by inside management, in-house counsel, or outside counsel with ties to the company as potentially tainted and, therefore, not truly independent.

Other cases – for example, those involving low-level employees, or in which the government is not and probably will not become involved – might appropriately be handled by inside management and counsel, who, in turn, may choose to retain their own outside counsel. Bear in mind, however, that the potential seriousness of the suspected wrongdoing, or the possible criminal involvement of high-level management, may not be apparent at the beginning of the investigation. Thus, an internal investigation that is overseen by persons who ultimately are implicated in the wrongdoing, or who have ties to those who are, may be compromised from the start.

In any investigation, inside and/or outside counsel should be involved from the outset. Even if the results of the investigation ultimately will be disclosed to the government, the investigation should be constructed from the beginning with a view toward maintaining the confidential and privileged nature of the investigation, whether through the

attorney-client privilege, the work product doctrine, the self-evaluative privilege, or similar privileges. To that end, counsel's involvement will be essential.

Counsel involved in internal investigations also should understand that their conduct will be scrutinized carefully by the government, which will be on the lookout for any indication that the investigation was conducted with an eye to skewing the facts or, worse yet, obstructing the investigation or "covering up" any misconduct.

Finally, counsel should consider carefully precisely what actions they will take in the investigation. For example, if in-house counsel overseeing the investigation actually conduct employee interviews, they could render themselves fact witnesses and, therefore, ineffective in any subsequent negotiations with the government. Instead, in-house counsel who are overseeing an investigation should consult with outside counsel on the appropriate method for proceeding under the particular circumstances.

3. Retention of Documentary and Electronic Evidence

To the extent your company does not already have in place an appropriate document retention policy, it should institute one immediately. The details of such policies are beyond the scope of this presentation, and in any event must be tailored to the specific needs of the company and its industry. But the existence of an internal investigation makes a proper document- retention policy all the more imperative. The failure to preserve relevant evidence could have several adverse consequences, including but not limited to the government's calling into question the integrity of the investigation and intensifying its independent efforts to investigate wrongdoing; a court's authorization of an "adverse inference" instruction or a spoliation claim in subsequent litigation; and, even more serious, possible obstruction of justice charges.

Counsel must ensure that all existing documentary and electronic evidence that potentially could be relevant to the investigation is preserved, and that all such evidence is preserved going forward. Thus, as soon as possible after a compliance issue is raised, “hold” orders should be distributed to all those who might possess relevant evidence now or in the future.

Preservation of electronic evidence can be particularly tricky. Electronic evidence easily can be destroyed inadvertently. For example, many companies have archive or deletion programs by which e-mails, voicemails, and other electronic communications (including those on backup systems) are deleted automatically at specified intervals. Electronic communications also can reside in a myriad of locations in addition to your company’s network, such as on individual employee’s work-issued computers, PDAs, and even home computers, as well as in personal email accounts. Counsel should consider whether to retain an outside firm to assist not only in the preservation of electronic data, but also in conducting any searches of electronic databases.

4. Disclosure Obligations and Insurance Notification Issues

Although beyond the scope of this paper, the possibility of corporate wrongdoing could trigger various disclosure obligations to the government and outside auditors, particularly in the wake of Sarbanes-Oxley. Likewise, insurance carriers may need to be notified if coverage potentially could exist for individual officers and directors or the company itself.

5. Interviewing Employees

In conducting interviews of present and former employees, counsel should bear in mind that they represent the company (or perhaps its Board or a committee of the Board, depending upon the engagement), but they do not

represent the employee. Thus, in certain circumstances, employees should be given so-called “Upjohn” warnings¹¹ that counsel represents the company, not the employee, and that the interview is confidential and (if applicable) privileged, but may be disclosed to third parties (including the government) at the company’s discretion. In addition, depending on the particular circumstances and the applicable ethical rules, counsel may wish to advise the employee to retain independent counsel. Indeed, counsel also may choose to give employees a “Zar” warning that providing false information to internal investigators may lead to possible criminal charges for obstruction of justice if the employee makes a false statement knowing and intending that it be passed on to the government.¹²

Of course, in determining how to proceed with employee interviews, counsel must take care that these “warnings” or other actions on the part of counsel do not serve to dissuade employees from providing full and truthful information. Such “overwarning” might be seen as witness tampering, obstruction of justice, and/or as part of a collusive attempt to scuttle the investigation by shutting down employee cooperation. Employee interviews, like all other aspects of the internal investigation, should be conducted so that they are – and appear to be – sincere and thorough efforts to get to the bottom of any potential wrongdoing.

¹¹ *Upjohn v. United States*, 449 U.S. 383 (1981). See discussion below.

¹² See, e.g., *United States v. Ira Zar*, Cr. No. 04-331(ILG), filed April 2004 (charging that Zar and other officers at Computer Associates International, Inc. made false statements to the company’s law firm and other lawyers “knowing and with the intent that they would, in turn, be presented to the United States Attorney’s Office, the SEC and the FBI” and thereby obstruct justice.

6. The Aftermath

Once an investigation is complete, the company will be faced with a number of decisions, including whether to disclose the results of the investigation to the government, and in what form, and the nature of any disciplinary or adverse employment action to be taken with respect to any officers, directors, and employees implicated in wrongdoing. The company should consult counsel – including criminal and labor and employment counsel – on the appropriate course of action.

Ethical Issues

The company's regular inside and outside counsel are sometimes confronted with an ethical tension in an internal investigation and must be mindful of the risks. Board members, directors, officers and employees often think of the company's lawyers as their "lawyer" when problems arise. The potential for confusion as to whether the lawyer represents the company or the individual needs to be confronted at an early stage. The corporate counsel must avoid having an "identity crisis," wondering who the actual client is and whether representation of more than one party is feasible and ethical.

Things become tricky for corporate counsel during an internal investigation because a corporation and its directors, officers, or other corporate individuals typically have a common interest in benefiting the corporate structure. These interests may diverge during an internal investigation, however, resulting in ethical dilemmas for corporate lawyers. Operating under the mistaken belief that they are consulting legal counsel, corporate officers and employees may disclose information to corporate lawyers during the course of an internal investigation with the expectation that such communication be kept confidential. Conflicts of interest may also arise when there are differing degrees of culpability between the corporation and its employees. Ethical rules and case law generally make clear that, in the absence of a joint-

representation agreement, the corporate lawyer's allegiance runs with the corporation and not with its officers or employees. To avoid violating ethical obligations to the client and the court, practitioners are well-advised to "Mirandize" corporate individuals regarding the nature of the lawyer's representation in an internal investigation, using the *Upjohn* case as guidance.¹³

From an ethical point of view, an internal investigation is a balancing act for corporate counsel. In such engagements, corporate lawyers must balance the competing interests of the corporation and its employees, as well as ethical obligations of the profession. In deciding how to proceed in an internal investigation, the prudent corporate lawyer must ascertain whether she can maintain both client relationships without jeopardizing their interests and must make a full disclosure of both her role as well as any actual or anticipated impediments to her representation. By following reasonable disclosure practices, corporate lawyers will be better prepared to navigate the ethical dilemmas that may lead to trouble for the lawyer and client down the road.

¹³ *Upjohn* and its progeny advise that counsel should convey the following information to avoid conflicting obligations and ethical impropriety: (1) corporate counsel is conducting an internal investigation on behalf of the corporation; (2) the purpose of the interview is to gather facts in order to render legal advice to the corporation; (3) corporate counsel represents the corporation and not any individual employee. The corporate counsel's role is not to render personal legal advice to the employee; (4) a corporate employee may seek independent legal representation during the internal investigation; (5) information disclosed to corporate counsel may not be protected under attorney-client privilege; and (6) information disclosed to corporate counsel may be disclosed to third parties at the corporation's discretion.

Conclusion

Counsel must consider a number of issues of when the company chooses to initiate an internal investigation into potential violations of the Foreign Corrupt Practices Act. Importantly, each investigation is unique, and, for better or worse, there is not a “one size fits all” solution to the myriad complex issues presented by such investigations. Early retention of outside counsel who is experienced in white collar criminal cases and related investigations is therefore essential to place the client in the best possible position and to avoid, or least lessen, any adverse consequences from a mishandled investigation.

WMH/PBH