Chapter 3

Bribery and Corruption

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Few enforcement topics have received more attention over the last few years than the issue of the bribing of foreign government officials by corporate entities. Yet this has not always been the case. Indeed despite an auspicious beginning in the mid-1970s, anti-bribery enforcement received little or no attention for over 20 years.

In the mid-1970s, in the wake of the Watergate scandal and as a result of investigations by the SEC, over 400 U.S. companies admitted to making questionable payments to foreign government officials, politicians, and political parties amounting to US$300 million. One of the organizations involved in such bribery was a major aerospace company. Executives at this company bribed foreign officials to favor their products not only in developing countries, but also in industrialized nations including Italy, the Netherlands, and Japan.[1] Scandals like these tested the public's confidence in the integrity of American businesses. In 1977, the Foreign Corrupt Practices Act (FCPA) was signed into law to restore this confidence. This act was amended by the International Anti-Bribery and Fair Competition Act of 1998, which was designed to implement the anti-bribery conventions of the Organisation for Economic Co-operation and Development (OECD). This amendment expanded the jurisdiction of the United States to prosecute foreign companies and nationals for corrupt payments within the United States.

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The FCPA also amended Section 30A of the Securities Exchange Act of 1934. It now contains a general rule prohibiting U.S. persons, entities, and issuers from giving or offering to give anything of value to any "foreign official" in order to obtain or retain business, to influence the official, or to induce the official to act in violation of his lawful duties. The prohibition against providing or offering "anything of value" to government officials includes not only cash, but also gifts, trips, and entertainment. Something seemingly innocuous, such as paying for a government official's dinner, may raise anti-bribery questions if the payment is intended or perceived as an attempt to influence the official to award business or take action favorable to the payor. Companies have paid substantial fines to settle proceedings brought for providing items of monetary value, including jewelry, gift certificates, perfume, first-class airfare, and the use of golf club memberships and condominium time shares. Political and charitable contributions have also come under close scrutiny. Other illegal payments have appeared in the form of bogus consulting payments, false items added to legitimate invoices, and even commissions or rebates that lack economic substance, all intended to disguise a bribe.

The term "foreign official" is defined in the FCPA as an officer or employee of any foreign government or any department, agency, or instrumentality of such government; any political party, official, or candidate; any public international organization; or "any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or . . . public international organization." This has been broadly interpreted by the DOJ and SEC to include employees of state-owned entities.[2]

The sole exception included in the FCPA to the prohibition of giving or offering anything of value to foreign officials applies to routine governmental action and appears in Section 30A(b) of the Securities Exchange Act. It provides that Section 30A(a) shall not apply to "any facilitating or expediting payment" to a foreign official "to expedite or to secure the performance of a routine governmental action." Routine governmental action is defined as that which is ordinarily and commonly performed by a government official, such as obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection or mail pickup and delivery; providing phone service or power and water supply; loading and unloading cargo or protecting perishable products; scheduling inspections associated with contract performance or transit of goods across country; and "actions of a similar nature."[3] While the last category is not well defined, it's generally viewed that the governmental action must be clearly ministerial in nature and the facilitating payment exception specifically does not include any decision to award new business, to continue existing business, or "to obtain any improper advantage."[4] Accordingly, a key question to be answered in determining if the

facilitating payment exception applies is whether the foreign individual to whom the payment is made has discretionary authority over the matter at hand.

The statute provides two affirmative defenses to an alleged FCPA violation. To avoid liability for an otherwise actionable payment under the FCPA, a U.S. person, entity, or issuer must show that (1) the payment was lawful under the laws of the foreign official's country or (2) the payment was a reasonable expenditure for promotional activities. For the payment to be lawful under the laws of a foreign country, there must be a written statute or regulation to support the legality of the action. This is not the same thing as "traditional" or "customary" or "not enforced"—even if confirmed by local counsel. There must be a written law authorizing or supporting the payment. For promotional expenses to pass muster, the expenses must be reasonable, bona fide, and clearly connected to the business of the company.

The accounting provisions of the FCPA provide guidance for the maintenance of books, records, and internal controls. Section 13(b)(2)(A) of the Securities Exchange Act requires issuers* to maintain books, records, and accounts that, in reasonable detail, accurately reflect the transactions and dispositions of the issuer. Section 13(b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are authorized by management and are recorded as necessary to account for assets and to permit preparation of financial statements in conformity with U.S. GAAP. When read in conjunction with Section 30A, this, not surprisingly, means that payments to foreign officials must be accurately recorded in the books and records.

For 20 years following the enactment of the FCPA in 1977, the United States was the only country with a formal law that provided for the prosecution of domestic companies for paying bribes abroad to foreign government officials. During this period, bribery payments were not only legal but also tax deductible in many other countries.[5] This began to change in December 1997 when 33 other countries joined the United States (38 as of 2010) in signing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).[6]

The Corruption Perceptions Index (CPI) determined by Transparency International indicates the perceived level of public-sector corruption in 180 countries and territories.[7] According to the 2010 index, a selection of which is shown in Table 3.1, the majority of the 178 countries scored below 5 on a scale

* The FCPA's accounting provisions apply to publicly held U.S. companies considered "issuers" under the Securities Exchange Act. To qualify as an issuer under the FCPA, an entity either must be required to file reports with the SEC under §r15(d) of the Exchange Act or must have securities registered with the SEC under §12 of the Exchange Act. The definition of "issuers" is sufficiently broad to cover corporations with bonds or American depository receipts traded on U.S. markets or stock exchanges. Unlike the anti-bribery provisions, the accounting provisions do not apply to "domestic concerns" that are not issuers.

Table 3.1.

Rank	Country/ Territory	CPI 2010 Score	Surveys Used	90% Confidence Interval
	Sampling from Top Third			
1	New Zealand	9.3	6	9.2–9.5
6	Canada	8.9	6	8.7–9.0
8	Switzerland	8.7	6	8.3–9.1
10	Norway	8.6	6	8.1–9.0
15	Germany	7.9	6	7.5–8.3
20	United Kingdom	7.6	6	7.3–7.9
22	United States	7.1	8	6.5–7.7
28	United Arab Emirates	6.3	5	5.4–7.3
30	Israel	6.1	6	5.7–6.6
30	Spain	6.1	6	5.7–6.5
54	South Africa	4.5	6	4.1–4.8
	Sampling from Middle Third			
62	Ghana	4.1	7	3.4–4.7
67	Italy	3.9	6	3.5–4.4
69	Brazil	3.7	7	3.2–4.3
78	Greece	3.5	6	3.1–3.9
78	China	3.5	9	3.0–4.0
78	Thailand	3.5	9	3.2–3.9
87	India	3.3	10	3.0–3.5
98	Mexico	3.1	7	2.9–3.3
98	Egypt	3.1	6	2.9–3.4
101	Dominican Republic	3.0	5	2.7–3.2
	Sampling from Bottom Third			
127	Syria	2.5	5	2.1–2.8
127	Belarus	2.5	3	2.1–3.1
134	Nigeria	2.4	7	2.2–2.7
134	Philippines	2.4	9	2.1–2.7
134	Ukraine	2.4	8	2.1–2.6
154	Russia	2.1	8	1.9–2.3
154	Cambodia	2.1	9	1.9–2.2
164	Venezuela	2.0	7	1.8–2.1
168	Angola	1.9	6	1.8–2.0
172	Turkmenistan	1.6	3	1.4–1.8

Source: Transparency International, "Corruptions Perceptions Index 2010," Transparency International Surveys and Indices, www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

from 0 (perceived to be highly corrupt) to 10 (perceived to be very clean). Of the 178 countries, the Scandinavian countries were perceived to be some of the least corrupt countries, ranging from the high score of 9.3 for Denmark to 8.6 for Norway. On the other hand, the emerging BRIC (Brazil, Russia, India, and China) countries ranked in the bottom two-thirds of the index, with Brazil scoring at 3.7, China at 3.5, India at 3.3, and Russia at 2.1.

Article 1 of the OECD Convention states that each signatory should make it a criminal offense "to offer, promise or give any undue pecuniary or other advantage . . . to a foreign public official in order to obtain or retain business or other improper advantage." This includes obtaining permits or preferential treatment in relation to taxation, customs, and judicial or legislative proceedings. As currently written, the OECD Convention focuses on the conduct of public officials, but a wider scope may be addressed in future revisions.[8]

Each signatory to the OECD Convention agreed to work to impose "effective, proportionate and dissuasive non-criminal sanctions"[9] on offenders and to impose sanctions "when the offence is committed in whole or in part in its territory."[10] (The phrase "in part" typically refers to cases in which the direction to pay the bribe has been made from the home country.) In addition to criminalizing the payment of bribes to public officials, the OECD Convention also contains an agreement or a books-and-records provision that prohibits "the establishment of off-the-book accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures . . . as well as the use of false documents . . . for the purpose of bribing foreign public officials or of hiding such bribery."[11] The agreement also provides for mutual legal assistance between signatories, including extradition for bribery offenses.

In March 2010, the OECD Working Group on Bribery issued Good Practice Guidance on Internal Controls, Ethics, and Compliance, which offers business organizations a number of practices to consider in their efforts to effectively combat bribery and corruption. These "good practices" include adopting a "clearly articulated and visible corporate policy for prohibiting foreign bribery" that receives "strong, explicit and visible support and commitment from senior management"; instilling a sense of responsibility for monitoring and ensuring compliance at "all levels of the company" and providing select senior officers with an "adequate level of autonomy from management" to "report matters directly to independent monitoring bodies" at the company; ensuring "periodic communication and documented training"; and implementing specific measures to prevent and detect bribery by third-party business partners such as risk-based due diligence, as well as disciplinary procedures to address violations.[12]

These agreements and international efforts have also influenced other countries to draft their own legislation and enforcement actions. In the United Kingdom, the Bribery Act 2010 was enacted in April 2010 (now effective April

2011) with the following components: (1) a more effective legal framework to combat bribery in both the public and the private sectors; (2) two general offenses covering the offering, promising, or giving of an advantage, and the requesting, agreeing to receive, or accepting of an advantage; (3) a discrete offense of bribery of a foreign public official; and (4) a new offense of failure by a commercial organization to prevent a bribe being paid for or on its behalf, but it will be a defense if the organization has "adequate procedures" in place to prevent bribery.[13] This Bribery Act has many similar elements to the FCPA and is a comprehensive anti-bribery regulation. However, probably the largest difference between the two is that the Bribery Act allows for fewer affirmative defenses than the FCPA does, as the FCPA allows for "facilitating payments" and has language that allows for more open interpretation.

The challenge for many companies subject to laws criminalizing bribery and corruption is that they may be operating in geographies or with organizations where the concept of giving something before asking for something is part of the culture. Some companies complain that refraining from participating in culturally expected bribery norms puts them at a disadvantage when bidding alongside competitors with fewer ethical qualms or who are subject to fewer regulations because of the location of their headquarters.

This is particularly important in developing countries that may have weaker regulatory, legal, and enforcement regimes. The result, according to Ben Heineman, senior fellow on corporate governance at Harvard Law School and the Kennedy School of Government, as well as former senior vice president for law and public affairs at General Electric, is that bribery and corruption have a negative effect on societies and economies, especially in developing nations. According to Mr. Heineman, corruption "distorts markets and competition, breeds cynicism among citizens, stymies the rule of law, damages government legitimacy and corrodes the integrity of the private sector. It is a significant obstacle to development and poverty reduction. It also helps perpetuate failed and failing states, which are incubators of terrorism, the narcotics trade, money laundering, human trafficking and other types of global crime."[14] Despite these seemingly obvious negative effects, the bribing of government officials was long viewed in many parts of the world as culturally acceptable, a competitive necessity, and therefore an acceptable business practice.

In some places, laws can be vague and subject to interpretation and change, frequently without much notice to the general public. China, for example, writes or revises thousands of laws each year, some of which are left to interpretation by provincial or local judges who often have little or no legal background or experience.[15] Regardless, illicit payments and other forms of corruption result in significant business risks, ones likely to increase in light of increasing domestic and international regulatory scrutiny and law enforcement. Bribery risks can arise in

a variety of circumstances. In addition to direct dealings with government officials, in-country third parties such as sales or marketing agents, consultants, joint venture partners, or distributors present substantial risks to organizations. These risks arise either when third parties make improper payments to government officials or when a prospective business entity may be owned by or affiliated with a government official or close relative.

Similarly, merging with or acquiring a majority stake or operational control in another entity could make an acquirer liable for past and future anti-bribery violations. Enforcement authorities expect acquirers, among other things, to conduct anti-bribery due diligence, to halt any ongoing activity involving bribery, and to obtain contractual provisions and representations confirming an acquired company's compliance with applicable anti-bribery laws.

For most of the 30-plus years of its existence, the FCPA was the only legislation enacted in response to widespread corruption scandals, and prosecutions under this act were rare. However, in the last few years, prosecutions under the FCPA have increased significantly.

Figures 3.1, 3.2, and 3.3 illustrate the increase in regulatory actions against corporations and individuals related to FCPA matters. The simultaneous prosecution of individuals and their employers who are believed to have violated the FCPA is not always the case; the DOJ and SEC seem to vary their approach based on the unique circumstances of each case.

Between 2005 and October 2009, the Criminal Division of the DOJ filed 57 cases—more than the number of prosecutions filed in the almost 30 years between the enactment of the FCPA in 1977 and 2005. According to the

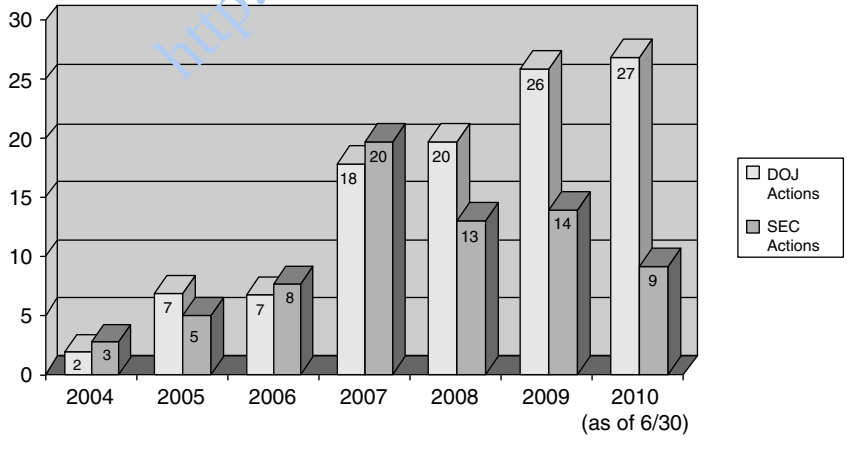

Figure 3.1. FCPA enforcement actions brought by DOJ and SEC, 2004–2010 (as of 6/30)

Source: 2010 Mid-Year FCPA Update, New York: Gibson, Dunn & Crutcher LLP, July 8, 2010.

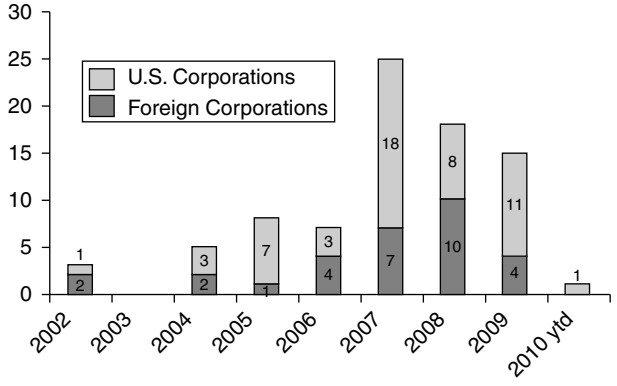

Figure 3.2. Total corporate matters initiated, 2002–2010
Source: Philip Urofsky and Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement,* New York: Shearman & Sterling LLP, March 4, 2010.

OECD's report on U.S. anti-bribery efforts released on October 15, 2010, the United States has more than 150 criminal and 80 civil ongoing FCPA investigations, many of which are parallel matters.[16] Some of the factors that have triggered this increase include:

- Penetration of U.S. companies into countries like oil-rich Nigeria, where energy concessions have an enormous value and there are other dynamics that resulted in a history of bribes being frequently solicited or paid
- The USA PATRIOT Act of 2001, which connected bribing foreign officials to the advancement of terrorist activity

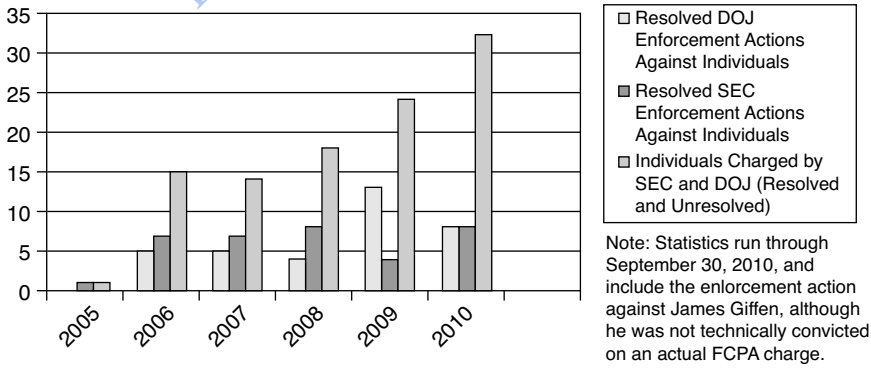

Figure 3.3. DOJ and SEC enforcement activity against individuals, 2005–2010 (through September 30, 2010)
Source: FCPA Autumn Review 2010, Washington, DC: Miller & Chevalier, October 8, 2010.

- The Sarbanes-Oxley Act of 2002, which made senior executives of public companies accountable for the accuracy of public disclosures related to a company
- A heightened sensitivity to potential FCPA violations in the targets of mergers and acquisitions
- A significant increase in voluntary disclosures

A brief look back over the last few years best illustrates the increasing breadth and severity of DOJ FCPA enforcement.

In February 2007, three subsidiaries of Vetco International Ltd. pleaded guilty to violating the anti-bribery provisions of the FCPA and agreed to pay $26 million in criminal fines. "This case represents the largest criminal penalty the Department of Justice has ever sought in a Foreign Corrupt Practices case," then-Deputy Attorney General Paul McNulty was quoted as saying at the time. It was an attention-grabbing sum, but such was the price tag for the criminal conduct described in the charging documents: making at least 378 corrupt payments totaling $2.1 million to induce Nigerian Customs Service officials to give the subsidiaries preferential treatment during the customs clearance process.[17]

Just two months later in April of that year, following its admission that it paid about $4 million in bribes to secure a contract for developing and operating an oil field in Kazakhstan, a subsidiary of Baker Hughes, Inc., agreed to pay $11 million in criminal fines, $10 million in civil penalties, and more than $24 million in profit disgorgement.[18]

In 2008, Siemens AG and three of its subsidiaries pleaded guilty to long-standing and systemic violations of the FCPA involving more than $1.4 billion in bribes paid to government officials across Asia, Africa, Europe, the Middle East, and the Americas. At the conclusion of this unprecedented investigation, the DOJ, the SEC, and the Munich Public Prosecutor's office collectively imposed on Siemens more than $1.6 billion in fines, penalties, and disgorgement of profits. Of that, $800 million was charged by U.S. authorities ($450 million going toward criminal fines), making the combined U.S. penalties the largest monetary sanction ever imposed in an FCPA case in U.S. history.

The globalization of anti-bribery and anti-corruption laws, regulations, and enforcement has led to parallel investigations in different jurisdictions by different agencies as was seen in the case of the Siemens AG investigation. Jeffrey Taylor, the U.S. Attorney for the District of Columbia at the time, said that the Siemens case "set the standard for multinational cooperation in the fight against corrupt business practices," while then-SEC Division of Enforcement Director Linda Chatham Thomsen characterized the end result as "a testament to the close, coordinated working relationship among the SEC, the U.S. Department of Justice, and other U.S. and international law enforcement."[19]

In 2009, Kellogg Brown & Root (now known as KBR, Inc.) paid $402 million in criminal FCPA penalties for its participation in a decade-long scheme to bribe Nigerian government officials to obtain government contracts.[20]

The focus on business combinations has resulted in more investigations and harsher penalties for corporations, for both acquirers and acquisition targets. According to the *2008 Anti-bribery and Anti-corruption Survey* conducted by KPMG LLP, only 36 percent of the respondents said they felt their organization's level of FCPA due diligence in a merger, acquisition, or other transaction in the past five years was "adequate." Twenty-seven percent described their organizations' FCPA due diligence as "minimal."[21]

In addition to other more frequently considered negative effects (e.g., revenue degradation, loss of public trust, and criminal prosecution), bribery and corruption violations may also impact the target's valuation. If an acquirer discovers during its due diligence that the target obtains business through the use of bribes, the acquirer will need to assess the impact that discovery may have on the quality of earnings resulting from the cessation of those suspect business practices. Such considerations may cause the acquirer to lower its bid, walk away from the transaction, or request guidance from federal regulators.

In June 2007, eLandia International Inc. acquired Latin Node Inc., a company that provided telecommunications services over the Internet. In April 2009, Latin Node Inc. pleaded guilty to violating the FCPA in connection with improper payments in Honduras and Yemen, agreeing to pay a $2 million fine. As a result of its postacquisition due diligence, investigatory efforts, and subsequent self-reporting to the DOJ, eLandia closed its just-acquired Honduras operations, terminated senior management in that country, and wrote off almost its entire $20-plus million investment due to the corrupt payments eLandia had not uncovered during its preacquisition due diligence.[22]

Bribery and corruption due diligence, which is discussed in more depth in Chapter 9, is, of course, most relevant in transactions that share certain types of high-risk characteristics. These high-risk characteristics include the degree of interaction with government and government officials, the geographic location of the target, the target's culture and governmental structure, the industry within which the target operates, the local accounting standards and laws regarding payment of bribes, the lack of an existing bribery and corruption compliance program and related internal controls at the target, and a customer base that includes governmental entities and agencies.

An analysis in "The Effectiveness of Laws against Bribery Abroad," by Alvaro Cuervo-Cazurra, assistant professor at the Moore School of Business, University of South Carolina, reveals that investors from countries that have implemented laws against bribery abroad have become more sensitive to host-country corruption, shown through reductions in foreign direct investment in

those countries perceived as corrupt after their home countries had implemented these anti-bribery laws. The implications of the findings of the study suggest that laws against bribery abroad appear to be effective, but only when the legislation in place is coordinated in multiple countries.[23]

However, there may also be unintended business consequences of anti-corruption regulation and the difficulties involved in navigating a global patchwork of regulation. According to a December 2009 survey published by Dow Jones,[24] over two-thirds of companies (70 percent) were delaying or abandoning business initiatives abroad as they collected information they needed to confidentially assess corruption risk. Sixty-five percent of those companies surveyed delayed or abandoned plans for new partnerships or entry into new markets due to legal questions arising from unclear anti-corruption regulations. Forty percent decided against entering emerging markets for fear of running afoul of anti-corruption regulations. Despite these concerns over potential negative consequences, companies doing, or intending to do, business overseas can implement programs and controls that can mitigate their concerns and safely navigate these challenges while taking advantage of cross-border commercial opportunities.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law in the United States. This act was created in response to a number of economic developments from 2008 to 2010 and is supposed to promote further financial stability and accountability. The Dodd-Frank Act provides the SEC with new powers of enforcement by including a "whistleblower bounty program." Under this bounty program, if the information provided by a person or persons leads to a successful SEC enforcement, the person or persons could receive 10 to 30 percent of the monetary sanctions in excess of $1 million. The Dodd-Frank Act will most likely increase the number of cases brought by the SEC against individuals and corporations and could provide a strong deterrent for other individuals and companies considering paying bribes.

Other deterrents for paying bribes are in the works now, as more bills are being introduced calling for greater accountability and greater repercussions for violations of anti-bribery acts. The Overseas Contractor Reform Act, if passed, would mandate the debarment of those found to be violators of the FCPA from additional or future federal government contracts. While the language of this bill is currently limited, the Overseas Contractor Reform Act could turn into a significant and effective piece of legislation in the prevention of bribery.

An FCPA Compliance Program

Policy and court filings by the Department of Justice clearly indicate that in making charging and disposition decisions, the government places considerable weight on whether and to what extent a company had a preexisting and effective

compliance program. In Part IV, we will discuss the elements of an effective compliance program. However, to the extent that a company is multinational or seeks to operate globally, the government also expects that an organization's compliance program will be effectively designed and implemented to reduce the prospect of violations of bribery laws. The DOJ's Opinion Procedure Release 04-02[25] lays out a basic framework for FCPA compliance programs and procedures. Its principles have been followed in numerous deferred and nonprosecution agreements involving FCPA-related issues as well as in the OECD's Good Practice Guidance mentioned earlier in this chapter. While many of these compliance program elements are common to all compliance programs, others are specific to the risk of an FCPA violation.

- The effectiveness of an FCPA compliance program is, more often than not, initially viewed through the lens of the code of ethics that drives it, more specifically, the FCPA-specific policies and procedures enshrined in such a code. The many components in a code of ethics usually include a preamble, broad policy statements, specific policy statements (which may include FCPA compliance requirements), and reporting mechanisms for employees. Ideally, any company with a myriad of global operations and businesses should include FCPA-specific policies and procedures in its code of ethics.
- The applicability of the FCPA-specific policies and procedures should be expanded to include all directors, officers, employees, and business partners—including, but not limited to, agents, consultants, representatives, joint venture partners, and teaming partners—involved in business transactions, representation, business development, or retention in a foreign jurisdiction (respectively, agents and business partners) that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign anti-corruption law will be violated.
- Establishing accountability standards plays a key role in the execution and monitoring of an FCPA compliance program. Independent senior employees reporting directly to a compliance committee of the audit committee of the board of directors should be given the responsibility for the implementation and oversight of the program and should be accountable in case there is a lapse in its functioning. The rising number of prosecutions of business executives, i.e., individual employees in FCPA-related violations, highlights the importance of establishing and maintaining standards of accountability.
- The relevance of training cannot be understated in making an FCPA compliance program effective. According to the *2008 Anti-bribery and Anti-corruption Survey* conducted by KPMG, only one-quarter of organizations with communication and training programs said training is mandatory for

all employees. The remaining 75 percent said they used a risk-based approach.[26] Training and communications should be formal and specialized and should be a coordinated effort by multiple departments within a company—including legal, compliance, human resources, and internal audit. It should extend to agents and business partners of a company in the various jurisdictions where the company operates.

- A reporting mechanism such as a hotline, managed independently, should be set up. The effectiveness of internal reporting mechanisms such as hotlines is especially critical in light of recent enhancements and protections afforded corporate whistleblowers under the Dodd-Frank Act. All employees, agents, and business partners should be aware of the existence of the hotline and be encouraged to use it to report suspected violations of the code of ethics or suspected illegal conduct. The appropriate department within the company should investigate the merit of any alert received through the hotline. The *2008 Anti-bribery and Anti-corruption Survey* conducted by KPMG revealed that only slightly more than one-quarter (27 percent) of companies with a hotline extended the hotline to parties outside their organizations with whom they have a business relationship, including agents and business partners.[27]
- Companies must investigate actual or alleged incidents related to bribery and corruption. External counsel or FCPA consultants may be engaged to investigate on behalf of the company, especially if the company does not have adequate resources to investigate such a complaint in a certain part of the world.
- After investigating the claims, if the suspected violation of the ethics code is proved, appropriate disciplinary procedures should be initiated.
- In addition to setting up internal control processes, companies should design stringent processes for dealing with agents and business partners. Preretention due diligence requirements and postretention oversight pertaining to all agents and business partners should be done. Further, complete records pertaining to such due diligence should be maintained. The Department of Justice's Opinion Procedure Release 08-01 elaborates on elements of an effective due diligence on a joint venture partner and describes maintenance of evidence of this due diligence centrally.[28] A committee consisting of senior officials within the business should review and document the appointment of agents and business partners and all contracts and payments related to such appointment. In all agreements, contracts, and renewals thereof with all agents, business partners, and other third parties, the following provisions should be included in contracts:
  - Representations and undertakings to not engage in corrupt activities
  - Compliance with foreign anti-corruption laws and other relevant laws

  - Allowance for internal and independent audits of the books and records of the agent, business partner, or other third party to ensure compliance with the foregoing
  - A provision for termination of the agent, business partner, or other third party as a result of any breach of applicable anti-corruption laws and regulations or representations and undertakings related thereto
- Among the different types of payments that present an FCPA compliance risk are promotional expenses, facilitating payments, charitable contributions, lobbying, and travel and entertainment expenses. Of these, facilitating payments are probably the most difficult to discern as being legitimate or otherwise. Facilitating payments should only be made if certain criteria are met, including modesty of the amount, infrequency of the payment, payment to a low-level government official performing ministerial and nondiscretionary duties, legality under local law, necessity to secure or expedite a routine government action, and appropriate recording of the payment in the books and records of the company. The DOJ has not looked favorably on facilitating payments in recent years, and it should be noted the April 2010 U.K. Bribery Act and March 2010 OECD Good Practice Guidance contain no similar exception. In each instance, the company should obtain legal advice before making such payments. As a result of these interpretive and compliance challenges and subsequent events, including the U.K. Bribery Act and OECD Good Practice Guidance mentioned previously, it was not surprising that KPMG's *2008 Anti-bribery and Anti-corruption Survey* found that only approximately 25 percent of the companies surveyed allowed facilitating payments to be made, while approximately 75 percent did not.[29]
- As a part of the aforementioned due diligence procedures, due care should be applied to help avoid delegating discretionary authority to individuals whom the company knows, or should know through the exercise of due diligence, to have a propensity to engage in illegal or improper activities. Due care is achieved through thorough background checks locally and in other geographies where the individuals operate. Background checks should also shed light on whether agents, business partners, or other third parties have government affiliations or relationships that may create heightened risk for an organization.
- A system of internal accounting controls to keep accurate books, records, and accounts should be implemented.
- Independent and objective audits by outside counsel or forensic accountants performed three years apart, at most, should be part of the FCPA compliance program to help assess whether the code of ethics, including its FCPA-specific provisions, is implemented in an effective manner.

Conclusion

An effective FCPA compliance program in today's environment requires managing risk arising from laws and regulations in many global jurisdictions. Of course, the precursor to designing and implementing an effective anti-bribery and anti-corruption compliance program is to assess and understand the risk of bribery and corruption occurring throughout the organization. Coordination across all business units and among various geographic locations of the company will help produce a comprehensive risk assessment and facilitate the development of a highly effective and manageable compliance program.