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What You Need to Know About the US Foreign Corrupt Practices Act (The "FCPA")

Anti-Corruption Provisions. The FCPA is a criminal statute that prohibits individuals and their companies from directly or indirectly offering or providing improper payments to non-U.S. government officials and employees of state-owned entities, public hospitals or universities, sovereign wealth funds, political parties, and public international organizations like the UN or the World Bank. Anti-corruption concerns typically arise when (i) selling products or services or engaging in other business, (ii) seeking concessions, investments, tax/duty assessments, court judgments, licenses, permits, or other regulatory approvals, or (iii) providing gifts, meals, entertainment, travel benefits, or other hospitalities.

Accounting Provisions. The FCPA requires U.S. public companies and other "issuers" (such as non-U.S. companies with ADRs traded in the United States) to maintain accurate books and records and a system of effective controls. Violations may occur if one conceals bribes in a public company's books or maintains slush funds. FCPA accounting concerns may also be triggered even in the absence of corruption.

Enforcement and Consequences. The U.S. Justice Department, the FBI, and the SEC are devoting major resources to investigate FCPA violations and have significantly increased enforcement activity over the past decade. Violations can result in significant fines, penalties, profit disgorgements, imprisonment, debarment from government contracting, the loss of export privileges, and other consequences. Many companies have had to pay hundreds of millions of dollars in penalties and senior executives have been sentenced to prison. FCPA concerns may also cause Sarbanes-Oxley violations and trigger shareholder derivative suits. As a result, FCPA compliance is a high priority for outside auditors.

Officer, Director, and Affiliate Liability. Directors, officers, and managers can be held personally accountable for authorizing, directing, or controlling FCPA violations committed by subordinates. Also, a U.S. parent company may be liable for FCPA violations caused by its domestic or foreign subsidiaries.

Investigations/Disclosures. The U.S. government expects companies to investigate and disclose FCPA violations. Companies that turn a blind eye could be viewed as authorizing corruption in its ranks. The U.S. government claims that companies that voluntarily disclose concerns may qualify for leniency.

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 or competitors may report those concerns to earn a reward.

Compliance Programs. The U.S. government expects a company to implement a risk-based compliance program that involves, among other matters, adopting appropriate policies and procedures, appointing independent compliance officers, providing compliance training to employees, and responding to reports of suspected violations.

Due Diligence. A company may face FCPA liability if its consultants, representatives, distributors, brokers, or joint venture partners make improper payments. This can occur even if the company did not have actual knowledge of the corruption. Many enforcement cases involve companies that have used corrupt third parties. Companies must perform FCPA-specific due diligence before retaining such third parties and insert appropriate anti-corruption compliance language in their agreements.

M&A. A target company in an M&A transaction that has a history of corruption may cause the acquiring company to face "successor liability." The acquiring company can also violate the FCPA if it allows the target company's corrupt activities to continue post acquisition. Due diligence, contract language, and effective compliance programs are important tools to counter these risks.