U.S. Foreign Corrupt Practices Act for Beginners

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Global Anti-Corruption Compliance Programs and the Challenge of Facilitating Payments

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Although the U.S. Foreign Corrupt Practices Act ("FCPA") prohibits companies and individuals from paying bribes to foreign officials to obtain or retain a business advantage, it also expressly allows payments intended to facilitate or expedite a foreign official's performance of such "routine governmental actions" as issuing permits and providing police protection. This article explores the treatment of "facilitating payments" under U.S. and foreign law, and suggests best practices for addressing these payments in a company's global anti-corruption compliance program.

As U.S.-based Universal Export Co.'s (UnivEx) trade compliance officer, you have become accustomed to receiving phone calls from anxious co-workers in search of guidance on various compliance issues. But this particular call has thrown you for a loop. Setting down your phone, you look back over the notes you scribbled while a sales manager relayed to you the details of UnivEx's most recent dilemma.

Apparently, UnivEx contracted to ship $1.3 million worth of widgets to a new customer in the Republic of Zubrowka by no later than July 28. The shipping containers arrived at a Zubrowkan port without incident on July 12, but the goods have now been stuck in customs for two weeks. When UnivEx's third-party customs broker in Zubrowka visited the customs office to inquire about the delay, the lower-level customs official on duty yawned and responded that he still needed to inspect the goods for compliance with Zubrowka's customs regulations. Asked how soon this inspection would occur, the customs official stated: "That depends. Right now, I estimate at least another two weeks. But if you slip me 10,000 klübecks, I could be persuaded to conduct the inspection today." Following this conversation, the broker immediately contacted the sales manager, who in turn called you to ask the following question: Can UnivEx legally authorize its broker to make the 10,000 klübeck (i.e., $200 U.S. dollars) payment to the Zubrowkan official and, if so, should it do so?

The answer to this question is complicated. On the one hand, the U.S. Foreign Corrupt Practices Act ("FCPA") prohibits companies like UnivEx from directly or indirectly paying bribes to foreign officials to obtain or retain a business advantage.[1] At first blush, the 10,000 klübeck payment sounds like a bribe. On the other hand, the FCPA contains an express exception for "facilitating," "facilitation," "expediting" or "grease" payments made to facilitate or expedite a foreign official's performance of such "routine governmental actions" as scheduling inspections related to the transit of goods.[2] This exclusion seems to cover the Zubrowkan official's demanded payment. To further complicate matters, however, many foreign countries have laws that prohibit government officials from receiving, and private parties from offering, payments to government officials to secure their performance of official duties. Thus, the requested payment might run afoul of Zubrowkan law. Even setting aside these legal concerns, UnivEx must still address the issue of whether, as a matter of company policy, it wants to oblige the Zubrowkan official's extortionate demand.

Companies that engage in global business — even those that steer clear of the infamous Zubrowkan market — are bound to encounter similar issues related to facilitating payments. Indeed, especially in developing markets, some low- to mid-level officials automatically expect such payments in exchange for performing their non-discretionary jobs. Accordingly, this article seeks to provide a brief overview of the key U.S. and foreign laws that govern facilitating payments, as well as best practices for companies that, like UnivEx, need to develop an anti-corruption compliance program that reduces the risk of running afoul of those laws.

Overview of the FCPA's anti-bribery provisions

Enacted in 1977, the FCPA contains two distinct sets of provisions: (1) the anti-bribery provisions,[3] which prohibit companies and individuals from bribing foreign officials; and (2) the accounting provisions,[4] which require publicly traded companies to keep accurate books and records and to establish and maintain internal accounting controls aimed at preventing and detecting bribery. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share responsibility for enforcing the FCPA.

The anti-bribery provisions, which contain the facilitating payment exception, sweepingly prohibit companies (both public and private) and individuals[5] from paying, offering or promising — either directly or through a third-party intermediary — anything of value to a foreign official with the corrupt intent of obtaining or retaining an improper business advantage.[6] To place facilitating payments in their proper context, I will address in more detail three key aspects of the anti-bribery provisions' prohibition.

First, the anti-bribery provisions do not make an exception for *de minimis* payments to a foreign official. Even a payment of seemingly minimal value can qualify as a bribe under the FCPA. For example, in its 2013 enforcement action against Helmerich & Payne, Inc. ("H&P"), the SEC alleged that H&P made improper payments to Venezuelan customs officials in the total amount of only $7,000 over a five-year period. Yet, the SEC determined those payments were illegal bribes because they were allegedly made to avoid customs inspections and compliance with Venezuelan import/export regulations.[7]

Second, the term "foreign official" includes not only actual government officials, but also the employees of government instrumentalities (e.g., state-owned or state-controlled companies), public international organizations (e.g., the United Nations), political parties, political party officials, and candidates for political office.[8] The term "foreign official" also is not limited to high-ranking officials; rather, a bribe paid to a low- to mid-level foreign bureaucrat constitutes a violation of the anti-bribery provisions to the same extent as a bribe paid to a foreign head of state.

Third, the FCPA's bribery prohibition is *not* limited to bribes paid to foreign officials to obtain or renew a contract. The U.S. Court of Appeals for the Fifth Circuit's 2004 decision in *United States v. Kay* rejected such a limited application of the FCPA, holding that the FCPA also prohibits bribes paid to a foreign official to secure such improper business advantages as avoiding the payment of lawful duties and taxes.[9]

With these three concepts in mind, I will now turn to explaining how the facilitating payments exception came into existence and why it has posed a challenge for compliance-minded companies ever since.

The FCPA's facilitating payments exception

When Congress enacted the FCPA in 1977, the FCPA's anti-bribery provisions did not expressly exclude any category of payments to foreign officials. The FCPA's legislative history, however, reflected Congress's intent to exempt "so-called grease or facilitating payments,"[10] such as "a gratuity paid to a customs official to speed the processing of a customs document" or other payments made to secure "the expeditious performance of similar duties of an essentially ministerial or clerical nature."[11]

In *United States v. Kay*, the Fifth Circuit summarized this legislative history, explaining that "[i]nstead of making an express textual exception for these types of non-covered payments, the respective committees of the two chambers sought to distinguish permissible grease payments from prohibited bribery by only prohibiting payments that induce an official to act 'corruptly.'"[12] In other words, Congress intended to *prohibit* payments made to influence

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a foreign official "to misuse his official position' and his discretionary authority,"[13] but to *permit* payments that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[14]

During the next decade or so, companies and individuals who were subject to the FCPA "experienced difficulty in discerning a clear line between prohibited bribes and permissible facilitating payments."[15] Consequently, Congress amended the FCPA in 1988 to "reflect current law and Congressional intent more clearly,"[16] especially with regard to facilitating payments.

As a result of these 1988 amendments, the FCPA's anti-bribery provisions expressly "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official."[17] The term "routine governmental action" includes only actions ordinarily and commonly performed by foreign officials in connection with: (i) obtaining permits, licenses, or other official documents to qualify to do business in a foreign country; (ii) processing governmental papers, such as visas or work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.[18] Moreover, the term "routine governmental action" expressly does *not* include any decision by a foreign official to award new business or to continue business.[19]

Treatment of facilitating payments by other countries

On November 21, 1997, the members of the Organisation of Economic Co-operation and Development (OECD) and five non-members adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[20] To date, the OECD's 34 member countries, as well as six non-member countries, have adopted the OECD Convention and implemented legislation prohibiting the bribery of foreign officials.[21]

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The United States played a central role in negotiating the OECD Convention, ensuring that the convention's prohibitions are fundamentally in accord with the FCPA's anti-bribery provisions. That said, the OECD Convention does *not* include an exception for facilitating payments or, as referred to in many other OECD signatory countries, "facilitation payments." Although the OECD Convention's official commentary states that "small 'facilitation' payments do not constitute payments made to 'maintain or retain business or other improper advantage' within the meaning of the OECD Convention," signatory states are free to choose whether to permit or prohibit facilitating payments.

Following the OECD Convention's adoption, only ten signatory states have joined the United States in enacting anti-bribery legislation that expressly permits facilitating payments: Australia, Austria, Canada, Greece, Korea, New Zealand, Slovak Republic, South Africa, Spain, and Switzerland.[22] Twenty-nine signatory states have declined to adopt such an exception.[23]

On November 26, 2009, the OECD issued a report that decried the "corrosive effect of small facilitation payments" and called on the OECD Convention's signatories to "encourage companies to prohibit or discourage the use of small facilitation payments."[24] Subsequently, the United Kingdom rejected the facilitating payments exception when it enacted the U.K. Bribery Act of 2010,[25] Australia called for public comment in November 2011 on whether or not to abolish facilitating payments as a defense to foreign bribery under the Criminal Code of 1995,[26] and Canada amended its Corruption of Foreign Public Officials Act in June 2013 to repeal the facilitating payments exception.[27]

The challenge of facilitating payments

Despite the global debate about the permissibility of facilitating payments, such payments remain legal under the FCPA. Nevertheless, facilitating payments still pose a significant challenge for U.S. companies and individuals for at least three reasons.

First, despite Congress's attempt in 1988 to clarify the FCPA's distinction between prohibited bribes and permissible facilitating payments, this distinction generally remains murky. Depending on the circumstances, a low- to mid-level foreign official might be merely performing a routine governmental action or she might be exercising discretionary decision-making authority. For example, there is often a fine line between paying a foreign customs official to expedite an inspection of permissible goods (which is likely a facilitating payment), and paying a foreign official to determine that the goods are permissible for customs clearance purposes in the first place (which is likely a bribe). Furthermore, unlike DOJ and SEC prosecutors who have the benefit of analyzing the situation after the fact, a company's on-the-ground employees and third-party intermediaries often must respond to a foreign official's request for a facilitating payment on the spot and without the ability to make a fully informed decision.

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Second, even if a company's payment to a foreign official indisputably qualifies as a facilitating payment under the FCPA, that payment still might violate the anti-bribery laws of other jurisdictions to which the company is subject, including the laws of the foreign official's home country. Thus, a payment to a foreign official that is perfectly legal under U.S. law could still lead to criminal or civil penalties for the company, its employees, and its third-party intermediaries under foreign law. And the only way truly to get to the bottom of this issue is to engage foreign country counsel to opine on whether or not the payments in question are permissible under the applicable foreign country's law.

Third, the DOJ and the SEC strongly discourage facilitating payments. In their November 2012 publication *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*FCPA Resource Guide*"), the DOJ and the SEC stress the perils of making facilitating payments and expressly refer to the OECD's 2009 report, which urged companies to prohibit or discourage the use of facilitating payments.[28] Additionally, in *United States v. Westinghouse Air Brake Technologies*, the defendant's non-prosecution agreement with the DOJ characterized as illegal certain payments that arguably qualified as facilitating payments under the FCPA — i.e., payments to Indian government officials to schedule pre-shipping inspections of products.[29] In short, the DOJ and the SEC appear to be attempting to narrow the facilitating payment exception's scope and will likely afford less prosecutorial leniency to companies that fail to prohibit or discourage such payments.

Anti-corruption compliance program best practices

In the *FCPA Resource Guide*, the DOJ and the SEC state that a company's "code of conduct is often the foundation upon which an effective compliance program is built," and that "effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks."[30] Facilitating payments are among the risks that the DOJ and the SEC expressly advise companies to address when drafting their anti-corruption compliance policies and procedures.[31] Thus, companies like UnivEx should adopt, implement, and adhere to an anti-corruption policy and related procedures (including training of appropriate employees and third-party intermediaries) that address facilitating payments.

Given the risks associated with facilitating payments, a company would be extremely ill-advised to adopt an anti-corruption compliance policy that provides employees and third-party intermediaries with unfettered discretion over whether and when to make facilitating payments. Instead, companies should consider adopting one of the following two options:

Option #1: Prohibit facilitating payments under any and all circumstances. According to a survey conducted by Trace International in 2009, 34.7% of the companies surveyed had outright banned facilitating payments,[32] and anecdotal reports suggest that this percentage has likely grown during the past five years. This approach has the benefits of simplicity and ease of administration. Rather than trying to educate employees and third-party intermediaries about the subtle distinctions between permissible facilitating payments and prohibited bribes, companies that select this option can simply ban any and all payments to foreign officials that could reasonably be regarded as bribes. Additionally, this approach eliminates the need to engage local counsel in multiple foreign jurisdictions to confirm that each facilitating payment complies with applicable foreign country laws.

Option #2: Strongly discourage facilitating payments, permitting them only under narrow and clearly articulated circumstances. This approach takes into account the facts that the FCPA expressly permits companies and individuals to make facilitating payments, and that, in certain situations, a company's refusal to make a small facilitating payment can have significant negative financial consequences. If a company selects this second option, it should generally impose at least the following conditions: (1) the company's compliance officer must provide advance written approval of the facilitating payment based on as much relevant information as reasonably possible under the circumstances; (2) the facilitating payment must be lawful for the company, its employees, and its third-party intermediaries to make under all applicable anti-corruption laws, including those of the foreign country in which the facilitating payment is made; and (3) the company must promptly and accurately record the payment in its books and records.

Depending on the company's anti-corruption risk profile, some companies may opt for additional limitations on facilitating payments (e.g., strict dollar limits), while others may adopt a more flexible, case-by-case approach with appropriate checks and balances. The key is that each company must develop policies and procedures that it can effectively administer in a real-world setting and confidently defend if a U.S. or foreign government enforcement agency inquires into the company's business practices abroad. If companies like UnivEx put such policies and procedures in place, they should be ready and able to respond decisively the next time a foreign official in Zubrowka or some other far-flung place asks to have his or her palms greased.

Endnotes

1. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

2. *See id.* §§ 78dd-1(b), 78dd-1(f)(3), 78dd-2(b), 78dd-2(h)(4), 78dd-3(b), 78dd-3(f)(4).

3. *Id.* §§ 78dd-1, 78dd-2, 78dd-3.

4. *Id.* § 78m(b).

5. The FCPA applies to (a) "issuers," which are entities required under the U.S. Securities Exchange Act to register under Section 12 or to file reports under Section 15(d), *id.* §§ 78dd-1, 78m; (b) "domestic concerns," which includes individuals who are U.S. citizens, nationals or residents, as well as business entities (public or private) with their principal place of business in the United States, or which are organized under the laws of a U.S. state, territory, possession or commonwealth, *id.* §§ 78dd-2, 78dd-2(h)(1); and any individual or entity other than issuers or domestic concerns who uses the mails or instrumentalities of interstate commerce, while within U.S. territory, to carry out an act prohibited under the FCPA, *id.* § 78dd-3.

6. *See id.* §§ 78dd-1, 78dd-2, 78dd-3. The penalties for running afoul of the anti-bribery provisions are severe. Entities face criminal fines of up to $2,000,000 per violation and civil penalties of up to $10,000 per violation, and individuals face criminal fines of up to $100,000 and/or imprisonment of not more than five years per violation, and civil penalties of up to $10,000 per violation. *Id.* §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A), 78ff(c)(2)(A).

7. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009), *available at* www.sec.gov/litigation/admin/2009/34-60400.pdf.

8. 15 U.S.C. § 78dd-1(f)(1).

9. 359 F.3d 738, 755 (5th Cir. 2004).

10. H.R. Rep. No. 95-640, at 4 (1977).

11. H.R. Rep. No. 95-640, at 4; S. Rep. No. 95-114 (1977).

12. 359 F.3d at 747 (citing H.R. Rep. No. 95-640, at 7–8; S. Rep. No. 95-114, at 10).

13. *Id.* (citing H.R. Rep. No. 95-640, at 7–8; S. Rep. No. 95-114, at 10).

14. *Id.* (citing H.R. Rep. No. 95-640, at 8).

15. *Id.* at 750 (citing S.Rep. No. 100-85, at 53 (1987) (stating that "the method chosen by Congress in 1977 to accomplish [the task of distinguishing grease payments from bribery] has been difficult to apply in practice")).

16. S.Rep. No. 100-85, at 54; H.R.Rep. No. 100-40, pt. 2, at 77 (1987).

17. 15 U.S.C. § 78dd-1(b).

18. *Id.* §§ 78dd-1(b), 78dd-1(f)(3)(A), 78dd-2(b), 78dd-2(h)(4)(A), 78dd-3(b), 78dd-3(f)(4)(A).

19. *Id.* §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

20. OECD Doc. DAFFE/IME/BR(97)20, *reprinted in* 37 I.L.M. 1 (1998).

21. Org. of Econ. Co-operation and Dev., *OECD Convention on Combating Bribery*

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of Foreign Public Officials in International Business Transactions: Ratification Status as of 8 April 2014*, at http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus_April2014.pdf. Latvia will officially become the OECD Anti-Bribery Convention's forty-first party on May 30, 2014.

22. Andy Spaulding, "Facilitating Payments (De)mystified (Conclusion)," The FCPA Blog (June 28, 2012), at http://www.fcpablog.com/blog/2012/6/28/facilitating-payments-demystified-conclusion.html.

23. *Id.*

24. OECD Working Grp. on Bribery of Foreign Pub. Officials in Int'l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at 4 (Nov. 26, 2009) (amended Feb. 18, 2010), *available at* http://www.oecd.org/daf/anti-bribery/44176910.pdf.

25. *See* Bribery Act, 2010, c. 23 §§ 1-9 (U.K.). According to the U.K. Ministry of Justice, the United Kingdom has rejected facilitating payments because they "create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused." U.K. Ministry of Justice, The Bribery Act 2010 18 (2011), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

26. *See* Australian Gov't, Dep't of Foreign Affairs & Trade, *Recent Developments: Assessing the "Facilitation Payments" Defense Under Australian Foreign Bribery Law*, http://www.dfat.gov.au/issues/measures-against-corruption.html. Although the public comment period has since closed, the Australian Government has yet to indicate how it intends to proceed on the issue. *See id.*

27. *See* Fighting Foreign Corruption Act, R.S.C., ch. 26 (Can. 2013). Recognizing that Canadian companies will require some time to change their policies and procedures to ban facilitating payments, the new legislation will not take effect until a future yet-to-be-determined date. *See id.*

28. U.S. Dep't of Justice & U.S. Sec. & Exch. Comm., A Resource Guide to the U.S. Foreign Corrupt Practices Act [hereinafter "FCPA Resource Guide"] 25-26 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

29. Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div. Dep't of Justice, to Eric A. Dubelier, Reed Smith LLP, app. A at 3–4 (Feb. 8, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf.

30. FCPA Resource Guide, *supra* note 28, at 57-58.

31. *Id.* at 58.

32. Trace Int'l, Inc., Trace Facilitation Payments Benchmarking Survey 8 (2009), *available at* https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf.

Option #2: Strongly discourage facilitating payments, permitting them only under narrow and clearly articulated circumstances.

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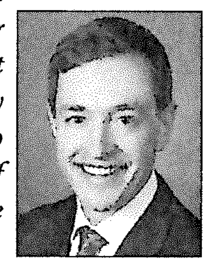

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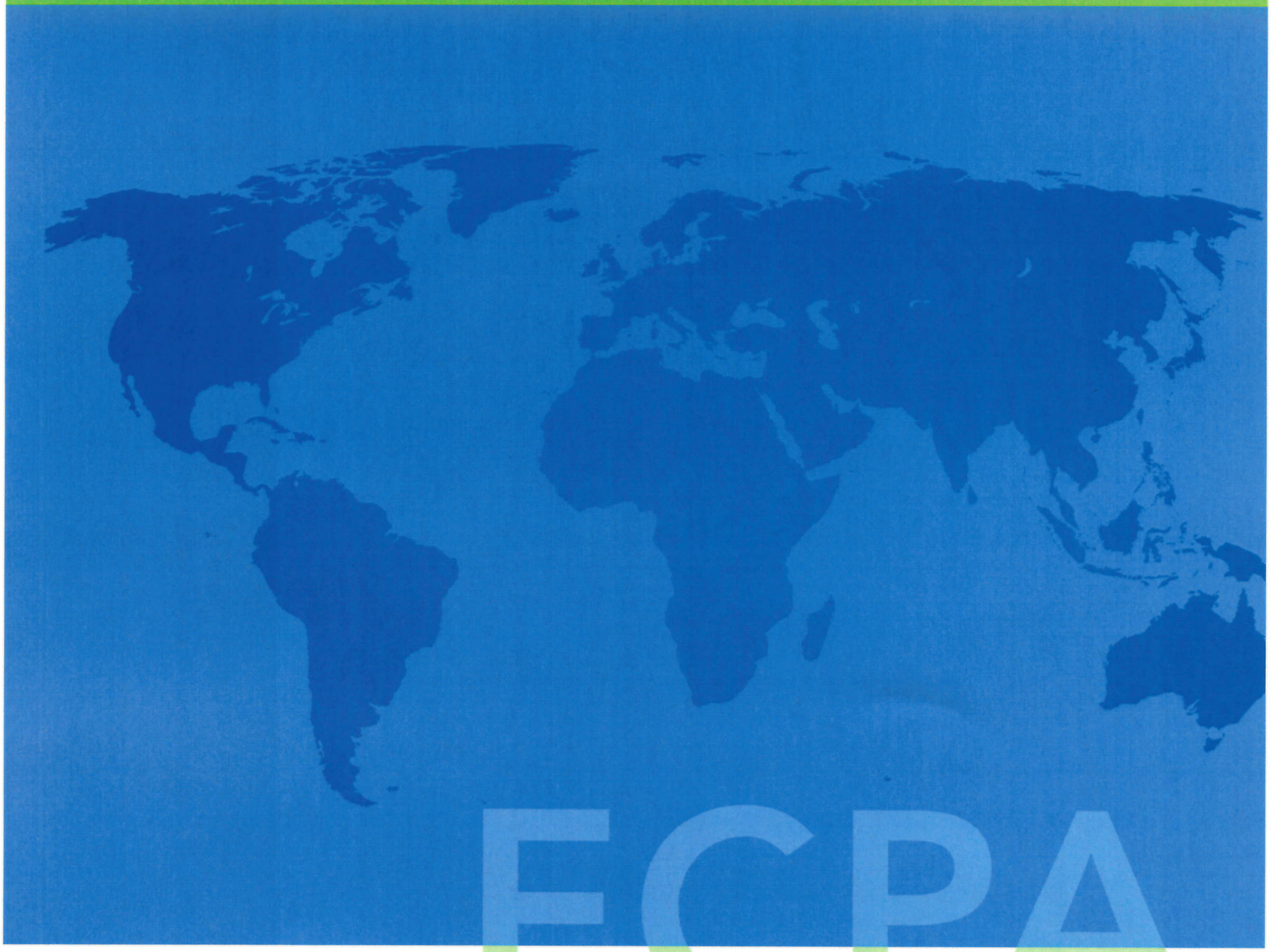

FCPA

A Resource Guide to the U.S. Foreign Corrupt Practices Act

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission

Hallmarks of Effective Compliance Programs

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs.[310] Indeed, small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating companies' compliance programs.

Compliance programs that employ a "check-the-box" approach may be inefficient and, more importantly, ineffective. Because each compliance program should be tailored to an organization's specific needs, risks, and challenges, the information provided below should not be considered a substitute for a company's own assessment of the corporate compliance program most appropriate for that particular business organization. In the end, if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

Commitment from Senior Management and a Clearly Articulated Policy Against Corruption

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a "culture of compliance"[311] and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business. A well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees to engage in misconduct to achieve business objectives, will be ineffective. DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption. This may be the result of aggressive sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team. The higher the financial stakes of the transaction, the greater the temptation for management to choose profit over compliance.

A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.[312]

In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.

Code of Conduct and Compliance Policies and Procedures

A company's code of conduct is often the foundation upon which an effective compliance program is built. As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company's behalf. Indeed, it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it. When assessing a compliance program, DOJ and SEC will review whether the company has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.

Whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures will also be considered by DOJ and SEC. These types of policies and procedures will depend on the size and nature of the business and the risks associated with the business. Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks. Among the risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments. For example, some companies with global operations have created web-based approval processes to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations. Many of these systems have built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests. These types of systems can be a good way to conserve corporate resources while, if properly implemented, preventing and detecting potential FCPA violations.

Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company.

Oversight, Autonomy, and Resources

In appraising a compliance program, DOJ and SEC also consider whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization.[313] Those individuals must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively.[314] Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee).[315] Depending on the size and structure of an organization, it may be appropriate for day-to-day operational responsibility to be delegated to other specific individuals within a company.[316] DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

Risk Assessment

Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company's compliance program.[317] One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective. A $50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest and routine gifts and entertainment. Similarly, performing identical due diligence on all third-party agents, irrespective of risk factors, is often counter-productive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program.

As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits. The degree of appropriate due diligence is fact-specific and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.

Training and Continuing Advice

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners.[318] For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training, however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter. In addition to the existence and scope of a company's training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

Incentives and Disciplinary Measures

In addition to evaluating the design and implementation of a compliance program throughout an organization, enforcement of that program is fundamental to its effectiveness.[319] A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation. Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences.

DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance program, and rewards for ethics and compliance leadership.[320] Some organizations, for example, have made adherence to compliance a significant metric for management's bonuses so that compliance becomes an integral part of management's everyday concern. Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company's compliance organization a way to advance an employee's career. SEC, for instance, has encouraged companies to embrace methods to incentivize ethical and lawful behavior:

> [M]ake integrity, ethics and compliance part of the promotion, compensation and evaluation processes as well. For at the end of the day, the most effective way to communicate that "doing the right thing" is a priority, is to reward it. Conversely, if employees are led to believe that, when it comes to compensation and career advancement, all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they'll perform to that measure. To cite an example from a different walk of life: a college football coach can be told that the graduation rates of his players are what matters, but he'll know differently if the sole focus of his contract extension talks or the decision to fire him is his win-loss record. [321]

No matter what the disciplinary scheme or potential incentives a company decides to adopt, DOJ and SEC will consider whether they are fairly and consistently applied across the organization. No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted. Rewarding good behavior and sanctioning bad behavior reinforces a culture of compliance and ethics throughout an organization.

Third-Party Due Diligence and Payments

DOJ's and SEC's FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program.

Although the degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the third-party, some guiding principles always apply.

First, as part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, companies should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party's introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, companies should undertake some form of ongoing monitoring of third-party relationships.[322] Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

In addition to considering a company's due diligence on third parties, DOJ and SEC also assess whether the company has informed third parties of the company's

Compliance Program Case Study

Recent DOJ and SEC actions relating to a financial institution's real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District's real estate arm. The government entity conducted the transactions through two special purpose vehicles ("SPVs"), with the second SPV purchasing a 12% stake in a real estate project.

The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity's payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity's offices; searching media sources; and conducting background checks on the entity's principals. The financial institution vetted the SPVs by obtaining a letter with designated bank account information from a Chinese official associated with the government entity (the "Chinese Official"); using an international law firm to request and review 50 documents from the SPVs' Canadian attorney; interviewing the attorney; and interviewing the SPVs' management.

Notwithstanding the financial institution's robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution's executive in charge of the project, and the SPV's attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA's internal control provisions and also settled with SEC.

compliance program and commitment to ethical and lawful business practices and, where appropriate, whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments. These can be meaningful ways to mitigate third-party risk.

Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation.[323] Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken. Companies will want to consider taking "lessons learned" from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and Review

Finally, a good compliance program should constantly evolve. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.

According to one survey, 64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs.[324] An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines.[325] Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.[326]

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks.[327] Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business's profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target's value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government, cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.[328] When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.[329]

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls "halfway" so as not to "choke the sales engine and cause a distraction for the sales guys." As a result, the improper payments continued, and the issuer was held liable for violating the FCPA's internal controls and books and records provisions.[330]

Other Guidance on Compliance and International Best Practices

In addition to this guide, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce's International Trade Administration has published *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*,[331] and the Department of State has published *Fighting Global Corruption: Business Risk Management*.[332]

There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.[333] Most notably, the OECD's 2009 Anti-Bribery Recommendation and its Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*,[334] published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:

- Asia-Pacific Economic Cooperation—*Anti-Corruption Code of Conduct for Business*;[335]
- International Chamber of Commerce—*ICC Rules on Combating Corruption*;[336]
- Transparency International—*Business Principles for Countering Bribery*;[337]
- United Nations Global Compact—*The Ten Principles*;[338]
- World Bank—*Integrity Compliance Guidelines*;[339]and
- World Economic Forum—*Partnering Against Corruption–Principles for Countering Bribery*.[340]

Hypothetical: Third-Party Vetting

Part 1: Consultants

Company A, a U.S. issuer headquartered in Delaware, wants to start doing business in a country that poses high risks of corruption. Company A learns about a potential $50 million contract with the country's Ministry of Immigration. This is a very attractive opportunity to Company A, both for its profitability and to open the door to future projects with the government. At the suggestion of the company's senior vice president of international sales (Sales Executive), Company A hires a local businessman who assures them that he has strong ties to political and government leaders in the country and can help them win the contract. Company A enters into a consulting contract with the local businessman (Consultant). The agreement requires Consultant to use his best efforts to help the company win the business and provides for Consultant to receive a significant monthly retainer as well as a success fee of 3% of the value of any contract the company wins.

What steps should Company A consider taking before hiring Consultant?

There are several factors here that might lead Company A to perform heightened FCPA-related due diligence prior to retaining Consultant: (1) the market (high-risk country); (2) the size and significance of the deal to the company; (3) the company's first time use of this particular consultant; (4) the consultant's strong ties to political and government leaders; (5) the success fee structure of the contract; and (6) the vaguely-defined services to be provided. In order to minimize the likelihood of incurring FCPA liability, Company A should carefully vet Consultant and his role in the transaction, including close scrutiny of the relationship between Consultant and any Ministry of Immigration officials or other government officials. Although there is nothing inherently illegal about contracting with a third party that has close connections to politicians and government officials to perform legitimate services on a transaction, this type of relationship can be susceptible to corruption. Among other things, Company A may consider conducting due diligence on Consultant, including background

(cont'd)

and reference checks; ensuring that the contract spells out exactly what services and deliverables (such as written status reports or other documentation) Consultant is providing; training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights); and ensuring that payments requested by Consultant have the proper supporting documentation before they are approved for payment.

Part 2: Distributors and Local Partners

Assume the following alternative facts:

Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A's products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project to Company A, claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or, in the alternative, a contribution to its marketing efforts, either in the form of a lump sum or as a percentage of the total contract. The requested discount/allowance is significantly larger than usual, although there is precedent at Company A for granting this level of discount in unique circumstances. Distributor further advises Company A that the Ministry's procurement officials responsible for awarding the contract have expressed a strong preference for including a particular local company (Local Partner) in the transaction as a subcontractor of Company A to perform installation, training, and other services that would normally have been performed by Distributor or Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.

What additional compliance considerations do these alternative facts raise?

As with Consultant in the first scenario above, Company A should carefully vet Distributor and Local Partner and their roles in the transaction in order to minimize the likelihood of incurring FCPA liability. While Company A has an established relationship with Distributor, the fact that Distributor has requested an additional discount warrants further inquiry into the economic justification for the change, particularly where, as here, the proposed transaction structure contemplates paying Local Partner to provide many of the same services that Distributor would otherwise provide. In many cases, it may be appropriate for distributors to receive larger discounts to account for unique circumstances in particular transactions. That said, a common mechanism to create additional margin for bribe payments is through excessive discounts or rebates to distributors. Accordingly, when a company has pre-existing relationships with distributors and other third parties, transaction-specific due diligence—including an analysis of payment terms to confirm that the payment is commensurate with the work being performed—can be critical even in circumstances where due diligence of the distributor or other third party raises no initial red flags.

Company A should carefully scrutinize the relationship among Local Partner, Distributor, and Ministry of Immigration officials. While there is nothing inherently illegal about contracting with a third party that is recommended by the end-user, or even hiring a government official to perform legitimate services on a transaction unrelated to his or her government job, these facts raise additional red flags that warrant significant scrutiny. Among other things, Company A would be well-advised to require Principal 1 to verify that he will have no role in the Ministry of Immigration's decision to award the contract to Company A, notify the Ministry of Immigration and his own ministry of his proposed involvement in the transaction, and certify that he will abide by the FCPA and other anti-corruption laws and that his involvement in the transaction is permitted under local law.

(cont'd)

Assume the following additional facts:

Under its company policy for a government transaction of this size, Company A requires both finance and compliance approval. The finance officer is concerned that the discounts to Distributor are significantly larger than what they have approved for similar work and will cut too deeply into Company A's profit margin. The finance officer is also skeptical about including Local Partner to perform some of the same services that Company A is paying Distributor to perform. Unsatisfied with Sales Executive's explanation, she requests a meeting with Distributor and Principal 1. At the meeting, Distributor and Principal 1 offer vague and inconsistent justifications for the payments and fail to provide any supporting analysis, and Principal 1 seems to have no real expertise in the industry. During a coffee break, Distributor comments to Sales Executive that the finance officer is naïve about "how business is done in my country." Following the meeting, Sales Executive dismisses the finance officer's concerns, assuring her that the proposed transaction structure is reasonable and legitimate. Sales Executive also reminds the finance officer that "the deal is key to their growth in the industry."

The compliance officer focuses his due diligence on vetting Distributor and Local Partner and hires a business investigative firm to conduct a background check. Distributor appears reputable, capable, and financially stable and is willing to take on real risk in the project, financial and otherwise. However, the compliance officer learns that Distributor has established an off-shore bank account for the transaction. The compliance officer further learns that Local Partner's business was organized two years ago and appears financially stable but has no expertise in the industry and has established an off-shore shell company and bank account to conduct this transaction. The background check also reveals that Principal 1 is a former college roommate of a senior official of the Ministry of Immigration. The Sales Executive dismisses the compliance officer's concerns, commenting that what Local Partner does with its payments "isn't our problem." Sales Executive also strongly objects to the compliance officer's request to meet with Principal 1 to discuss the off-shore company and account, assuring him that it was done for legitimate tax purposes and complaining that if Company A continues to "harass" Local Partner and Distributor, they would partner with Company A's chief competitor. The compliance officer and the finance officer discuss their concerns with each other but ultimately sign off on the deal even though their questions had not been answered. Their decision is motivated in large part by their conversation with Sales Executive, who told them that this was the region's most important contract and that the detailed FCPA questionnaires and robust anti-corruption representations in the contracts placed the burden on Distributor and Local Partner to act ethically.

Company A goes forward with the Distributor and Local Partner agreements and wins the contract after six months. The finance officer approves Company A's payments to Local Partner via the offshore account, even though Local Partner's invoices did not contain supporting detail or documentation of any services provided. Company A recorded the payments as legitimate operational expenses on its books and records. Sales Executive received a large year-end bonus due to the award of the contract.

In fact, Local Partner and Distributor used part of the payments and discount margin, respectively, to funnel bribe payments to several Ministry of Immigration officials, including Principal 1's former college roommate, in exchange for awarding the contract to Company A. Thousands of dollars are also wired to the personal offshore bank account of Sales Executive.

How would DOJ and SEC evaluate the potential FCPA liability of Company A and its employees?

This is not the case of a single "rogue employee" circumventing an otherwise robust compliance program. Although Company A's finance and compliance officers had the correct instincts to scrutinize the structure and economics of the transaction and the role of the third parties, their due diligence was incomplete. When the initial inquiry identified significant red flags, they approved the transaction despite knowing that their concerns were unanswered or the answers they received raised additional concerns and red flags. Relying on due diligence questionnaires and anti-corruption representations is insufficient, particularly when the risks are readily apparent. Nor can Company A or its employees shield themselves from liability because it was Distributor and Local Partner—rather than Company A directly—that made the payments.

The facts suggest that Sales Executive had actual knowledge of or was willfully blind to the consultant's payment of the bribes. He also personally profited from the scheme (both from the kickback and from the bonus he received from the company) and intentionally discouraged the finance and compliance officers from learning the full story. Sales Executive is therefore subject to liability under the anti-bribery, books and records, and internal controls provisions of the FCPA, and others may be as well. Company A may also be liable for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA given the number and significance of red flags that established a high probability of bribery and the role of employees and agents acting on the company's behalf.