



Outside Counsel Enforcement of Anti-Corruption Act in Current Economic Times

Expert Analysis

President Barack Obama's strong position on transparency in government and multilateralism, together with his attorney general appointee's experience with corruption investigations in public and private practice, strongly suggests that Foreign Corrupt Practices Act (FCPA) enforcement—with its promise of substantial fines and publicity—will be a greater Justice Department priority under the new administration.¹

This stepped up enforcement comes at a time when the current economic climate is increasing pressure on companies to take aggressive steps to develop business, which may expose companies that have sustained productivity through corrupt payments and pressure executives at struggling companies to consider such off-the-books practices to maintain profitability. This unique dynamic may result in companies caught between an aggressive Department of Justice agenda and one of the worst economic recessions in history.

Congress passed the FCPA in 1977 to combat the pervasive practice of bribery of foreign government officials by American corporations. The FCPA has three major provisions: a prohibition on bribing foreign officials, an obligation that a company's books and records accurately reflect the true nature of financial transactions (known as the "books and records" provisions), and a requirement to create and maintain a system of internal controls designed to detect and prevent conduct that would violate the FCPA (known as the "internal controls" provisions).

Under the FCPA, a bribe can include money, a tangible gift or anything else of value that is offered or given, directly or indirectly, to a foreign government official. The bribery provisions prevent payments to officers or employees of foreign governments, agencies and state-owned corporations, regardless of their level of seniority in the government, as well as candidates for political offices and foreign political parties.

The anti-bribery provisions of the FCPA apply to U.S. and foreign companies subject to



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the jurisdiction of the Securities and Exchange Commission; "domestic concerns," which are defined as any person or business entity that is organized under the laws of any state or U.S. territory whether or not it is subject to the jurisdiction of the SEC; U.S. persons who commit acts of bribery outside of the United States to make a corrupt payment; foreign nationals and entities that commit an act furthering a corrupt payment in the United States or using the U.S.

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mail, wires or financial system; and U.S. and foreign agents of any of the above.

The additional books and records and internal controls requirements apply only to issuers of securities that are required to file reports with the SEC; however, even entities that list American Depository Receipts are considered issuers for the purposes of this section. The books and records provisions require an issuer to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. §78m. These provisions can extend to an issuer's foreign affiliates and subsidiaries if the issuer controls more than 50 percent of the subsidiary's stock.

The internal controls provisions require a public company to maintain a system of internal accounting controls. A compliant system must provide reasonable assurance that transactions

are executed according to management's authorization; transactions are recorded as necessary to permit preparation of financial statements; and recorded assets are regularly compared to actual assets, and appropriate action is taken with respect to differences.

The single largest impact on FCPA enforcement will come from President Obama and Attorney General Eric Holder who will determine priorities for allocating the Justice Department's investigative and enforcement resources. While the former administration saw a reduced number of white collar prosecutions, the new administration will place significantly more emphasis on white-collar crime generally and the FCPA specifically, resulting in more cases, and possibly larger fines.

Early in his campaign, Senator Obama said that reforming government contracting practices would be a priority in his administration, having criticized no-bid government procurement practices related to the Iraq War effort based on relationships and favoritism.² It appears clear that President Obama will seek to institute a disciplined, impartial, competitive bidding process at home and enforce such violations overseas to the extent U.S. jurisdiction can capture those activities.³

Increased enforcement of the FCPA implicates these same policies and encourages foreign governments to eliminate graft. The intent of the statute is to deter American companies from winning contracts through bribery, as opposed to an open and fair bidding process resulting in the most-qualified bidder who can do the best job at the lowest price. Investigating and prosecuting corruption abroad allows the president to lead by example, enforce free market principles and expand his policy of transparency in government.

The president reinforced his platform of multilateral foreign policy and restoring America's image in the world community during his inaugural address. FCPA enforcement is one area that is ripe for international cooperation and collaboration.

Many of the FCPA investigations opened in recent years have involved parallel proceedings in other countries. These range from related investigations in other countries where the company that has made corrupt payments has major centers of operations (particularly where a company is listed on an American exchange

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but is headquartered in another country) to investigations by local law enforcement where the bribe was paid. For instance, one recent settlement was a joint effort among the Department of Justice, SEC and German prosecutors.

While it would be expected that European regulators and law enforcement would investigate and prosecute corruption by companies based in those countries, even countries where bribery is perceived as being common, such as India, have initiated investigations of bribes paid to government officials in their countries.⁴

The new administration will be looking for a variety of ways in which the U.S. can work with other governments to resolve common problems, and collaborative law enforcement in the FCPA arena provides a full framework to foster international cooperation on shared terrorism and other global concerns.

These investigations can also allow Mr. Obama to work within the framework of such institutions of The Organization for Economic Cooperation and Development or OECD, which concluded a convention on international bribery in 1997 and signed by 37 countries. Bribery investigations have the added appeal of being non-controversial: no country, aside from the most notoriously dishonest regime, wants to encourage corrupt payments to its officials.

In the current economic climate, governments have even greater incentives to deter corruption, which undermines their abilities to secure the most cost efficient contracts and services.

Additionally, the president's selection of Mr. Holder as attorney general similarly suggests that FCPA enforcement will be a Justice Department priority in the years to come. Having served in DOJ for more than sixteen years over the past three decades and handling white-collar defense matters in private practice at Covington & Burling, Attorney General Holder's years of experience investigating, prosecuting and defending corruption involving U.S. government officials suggest that corruption—inside and outside of the country—will remain a priority for him during his tenure as attorney general.

Following his vast Justice Department experience, Mr. Holder has represented clients in private practice in a range of criminal matters, including his representation of Chiquita International Brands in an investigation of payments of "protection money" the company made to a Colombian paramilitary group.⁵

This experience may bode well for companies who self-report violations of the FCPA, as Mr. Holder appreciates the pressures facing companies that identify potential FCPA issues and understands the time, effort and money that a thorough internal investigation before a self-report requires.

Indeed, in the *Chiquita* case, Mr. Holder told the *Washington Post* that he believed his client was treated unfairly when a \$24 million fine was imposed after self-reporting the payments, and expressed concern that such a large fine may discourage self-reporting. He explained "[h]ere's a company that voluntarily self-discloses in a national security context, where the company gets treated pretty harshly,

[and] then on top of that, you go after individuals who made a really painful decision."⁶

Thus, while the new attorney general will likely prioritize investigations into corrupt payments made outside of the U.S., there is a strong indication that he will give sufficient credit to companies that investigate and self-report violations.

Changing Market Conditions

Changing economic conditions can serve to reveal flaws and irregularities that already existed in our economic systems. The recession that began in December 2007 only explains part of the financial crisis that befell the United States and the world in the summer and fall of 2008.

The economic down-turn revealed frauds and fundamental corporate wrongdoing that might have otherwise proceeded undetected were it not for the fact that the falling economy can no longer support these schemes.

So far the economic turmoil has revealed deficiencies in mortgage-backed securities and the real estate industry; however, in the coming years as share prices continue to drop to reflect increased market pressures, companies that can no longer sustain the impressive growth of past years will come under enhanced governmental scrutiny. Questions will arise about how these companies were able to sustain their growth over time and, ultimately, such increased scrutiny may uncover corrupt payments where they exist.

Conversely, companies that otherwise would not have resorted to bribery and corruption in order to win contracts and business may find themselves facing increasing pressure from dissatisfied investors as well as stronger competition from their rivals, who face similar pressures. These companies may conclude, wrongly, that the only way to remain competitive is to engage in bribery. For example, a former executive of an international company told *The New York Times* that the purpose of its extensive pattern of bribery: "was about keeping the business unit alive and not jeopardizing thousands of jobs overnight[.]"⁷

As the pressure to preserve profits and maintain jobs intensifies in coming months, more company executives may choose to make side deals to secure business, at the peril of their corporation.

Industries to Watch

We expect the energy industry to be a major focus of FCPA enforcement activity in 2009. Record high oil prices in 2008 created a flurry of activity to develop reserves that were previously unexploited. Many of these fields were located in sub-Saharan Africa and Central Asia—regions that have long been associated with corruption. These deals may have been rushed along by companies eager to take advantage of high fuel prices and skyrocketing demand.

During this rush to capitalize on the boom, there is an enhanced risk that caution and compliance with the law may have been abandoned in some instances. We expect that law enforcement will be examining lucrative contracts with nations that have particularly poor records for corruption to determine if any

violations have occurred.

Avoiding the Problem

Stopping improper conduct is the best defense to an alleged FCPA violation. A well-designed and fully implemented FCPA compliance program incorporates the following elements:

- **Policy.** A policy that prohibits conduct that would violate the FCPA, including an unambiguous statement from management that corrupt payments to foreign government officials to obtain, or maintain, business is illegal and will be cause for immediate termination of employment.

- **Internal Controls.** A system of internal accounting controls designed to identify "red flag" suspicious payments and requires senior management's authorization to disburse funds related to high-risk transactions.

- **Training.** A mandatory, interactive, periodic education program for all officers, employees, consultants and venture partners concerning the requirements of the FCPA with enhanced requirements for employees in particularly high-risk jobs.

- **Reporting.** A confidential reporting system for officers, employees, consultants and venture partners to escalate questionable transactions.

- **Responsibility.** Designating senior officers as FCPA compliance watchdogs.

- **Diligence.** A robust vetting procedure for agents and consultants who will represent the corporation when negotiating foreign contracts, including signed attestations by agent or consultants that they will comply with the requirements of the FCPA.

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1. In comparison, over the last five years, the Justice Department (DOJ) under the Bush Administration has experienced an 18 percent decrease—a significant decline—in prosecutions of white-collar crime in favor of immigration and terrorism offenses. Solomon Moore, "Push on Immigration Crimes Is Said to Shift Focus," *The New York Times* (Jan. 12, 2009).

2. In a New Hampshire speech then-Senator Obama discussed, "[b]illions of no-bid, no-strings-attached contracts have been handed out in New Orleans and Iraq and at Walter Reed Medical Center on the sole basis of who you know and the favors you've done." Remarks of Senator Barack Obama, "Taking Our Government Back," Manchester, New Hampshire (June 22, 2007).

3. To emphasize his embrace of these values, on his first full day in office, President Obama issued two executive orders, not yet numbered, expanding the ability of private citizens to obtain presidential records and requiring appointees in executive branches to sign an ethics pledge regarding gifts from lobbyists and lobbying activities of appointees before and after serving in government. Executive Orders of Jan. 21, 2009, available at <http://www.whitehouse.gov>.

4. See, e.g., Saritha Rai "Xerox Investigation," *The New York Times* (July 19, 2002).

5. Carol D. Leoning, "In Terrorism-Law Case, Chiquita Points to U.S.," *Washington Post* (Aug. 2, 2007).

6. Id.

7. Siri Schubert and T. Christian Miller, "At Siemens, Bribery Was Just a Line Item," *The New York Times* (Dec. 20, 2008).