JONES DAY

MARCH 2006

2006 UPDATE ON TRANSNATIONAL ANTIBRIBERY LAWS

THE UNITED STATES FOREIGN CORRUPT PRACTICES ACT, INTERNATIONAL CONVENTIONS, AND RECENT ENFORCEMENT ACTIONS

Public corruption is a significant legal risk for any corporation doing business around the globe, particularly in developing and transition economies. Over the last 30 years, however, governments have taken great strides to reduce official corruption worldwide. The trend started in 1977 with the passage of the United States Foreign Corrupt Practices Act ("FCPA"). This law represented a dramatic shift in thinking, prohibiting U.S. corporations and nationals from bribing *foreign* government officials. To appreciate fully the impact of the FCPA, consider that, before the law's enactment, some companies would go so far as to deduct as a business expense the cost of paying bribes abroad.

Much of the world has begun to follow the United States' lead in fighting international corruption. For many years, U.S. corporations complained that they suffered from a competitive disadvantage vis-à-vis corporations in Europe and elsewhere that were free to bribe officials outside their home countries. Much of that criticism was muted in 1997 when 30 member countries of the Organisation for Economic Co-operation and Development ("OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Transactions. With the passage and enforcement of conforming legislation in signatory countries, U.S. corporations no longer can claim that a legal disadvantage exists, although accusations persist that some countries do not enforce their laws as vigorously as others.

In recent years, U.S. authorities have increased their enforcement activity regarding foreign corrupt practices. The number of actions taken against corporations and individuals for bribing foreign officials has risen, and the severity of the punishment imposed is likewise on an upswing. Perhaps most importantly, self-policing has become the norm, with corporations often reporting to authorities the actions of their own employees or business partners.

Because of this increased enforcement activity, managers and directors who run multinational corporations are rightfully concerned about their compliance efforts. In order to minimize the risks posed by foreign corrupt practices, an organization must have a clear understanding of the practices prohibited by the FCPA and similar applicable laws. Leaders and legal advisors also must remain up to date on the enforcement environment facing the organization. Finally, the managers who run the organization must be able to recognize "red flags"—circumstances under which the risk of corrupt practices is high and enforcement authorities therefore expect corporations to be particularly vigilant. With this knowledge and a commitment to ethical business practices, an organization can implement an effective compliance program to avoid the pitfalls of public corruption.

THE FOREIGN CORRUPT PRACTICES ACT

Notwithstanding the enactment of anticorruption legislation around the globe, the FCPA remains the most important law for companies whose business touches the United States. Enforcement of the FCPA by the United States Department of Justice and the Securities and Exchange Commission dwarfs the number of enforcement actions brought under other countries' laws, and the potential penalties remain higher in the United States than elsewhere. Moreover, U.S. enforcement authorities have shown a unique willingness to assert extraterritorial jurisdiction over foreign corporations that bribe non-U.S. officials.

The FCPA's basic prohibition is quite simple: A covered person or organization may not bribe a foreign official in order to obtain or retain business. The details of that prohibition, however, are quite important.

Who Is Covered by the FCPA. The FCPA applies to two broad categories of persons: those with formal ties to the United States and those who take action in furtherance of a violation while in the United States.

U.S. "issuers" and "domestic concerns" always must obey the FCPA, even when acting outside the country. An "issuer" is any company with securities registered in the United States or that otherwise is required to file reports with the Securities and Exchange Commission. 15 U.S.C. § 78dd-1(a). "Domestic concerns" is a broader category that encompasses any individual who is a citizen, national, or resident of the United States. The category of "domestic concerns" also includes any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship with its principal place of business in the United States or that is organized under the laws of a state, territory, possession, or commonwealth of the United States. 15 U.S.C. § 78dd-2(h)(1). Accordingly, U.S. corporations and nationals can be held liable for bribes paid to foreign officials even if no actions or decisions take place within the United States.

Entities and individuals are subject to the FCPA if any conduct involving the violation touches the United States. Thus, the FCPA applies even to non-U.S. nationals and corporations if any act in furtherance of the prohibited conduct takes place in the United States. *See* 15 U.S.C. § 78dd-3(a). This is no idle threat to non-U.S. corporations. The Department of Justice has used this provision to bring criminal charges against a foreign corporation for violating the FCPA. *See* July 6, 2004, United States Department of Justice Press Release, *ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges* (www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm).

What the FCPA Prohibits. A violation of the FCPA consists of five "elements." That is, a person or organization is guilty of violating the law if the government can prove the existence of:

(1) a payment, offer, authorization, or promise to pay money or anything of value
(2) to a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official
(3) with a corrupt motive
(4) for the purpose of (a) influencing any act or decision of that person; (b) inducing such person to do or omit any action in violation of his lawful duty; (c) securing an improper advantage; or (d) inducing such person to use his influence to affect an official act or decision
(5) in order to assist in obtaining or retaining business for or with, or directing any business to, any person.

15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). A covered individual or entity that violates the FCPA can be subject to criminal charges by the DOJ, which might lead to imprisonment or a fine.

The definitions of "payment" and "foreign official" are sufficiently broad to cover virtually any benefit conferred on someone in a position to affect a person's business dealings with a foreign government. Nonmonetary benefits, including travel and entertainment, fall within the FCPA's definition. Likewise, the Department of Justice has taken the position that managers of state-owned business enterprises are "foreign officials" for purposes of the FCPA. *See, e.g.,* Department of Justice FCPA Review Procedure Release 83-02 (July 26, 2002) (treating as a "foreign official" the general manager of a company owned by a foreign government and with which a U.S. company was entering a joint venture). The statute contains no monetary threshold; even the smallest bribes are prohibited.

Under the terms of the FCPA, a bribe need not actually be paid in order to violate the law. Rather, the FCPA prohibits the offer, authorization, or promise to make a corrupt payment in addition to the actual payment.

The FCPA prohibits payments made with a "corrupt" motive. The legislative history of the statute describes this as "evil motive or purpose, an intent to wrongfully influence the recipient." S. Rep. No. 114, 95th Cong. 1st Sess. 10 (1977). The Supreme Court likewise recently reinforced the notion that a criminal prohibition against "corrupt" conduct requires a consciousness of wrongdoing, although the Court declined to provide an all-encompassing definition for the statutory term. *Arthur Andersen LLP v. United States,* 125 S. Ct. 2129 (2005). It is clear, however, that truly innocent mistakes are not illegal under the FCPA.

The last two elements of an FCPA antibribery violation describe the purpose for which the payment must be made in order to violate the statute. As these elements suggest, the FCPA broadly prohibits any payment designed to cause an official to take any action or make any decision that would benefit the payor's business interest. Note that the business to be "obtain[ed] or retain[ed]" by the corrupt payment need not be with the government or a government-owned entity. Rather, the FCPA is violated if a corrupt payment is made in order to facilitate improperly the obtaining or retaining of business with a third party.

You Can't Bury Your Head in the Sand. The FCPA prohibits only a "knowing" violation. When making a payment, businesses must be mindful of all the circumstances. When it passed the FCPA, Congress indicated that it intended to prohibit actions that "demonstrate evidence of a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to high probability of violations of the Act." H.R. CONF. REP. No. 100—579, at 919—20 (1988). Businesses ignore at their own peril "red flags" such as those described below.

Penalties for Violating the FCPA Antibribery Provisions. *Criminal Penalties.* Individuals face up to five years' imprisonment for each violation of the antibribery provisions of the FCPA, or 10 years for certain willful violations. 15 U.S.C. §§ 78dd-1 *et seq.* Corporations and other business entities may be fined up to $2 million for each violation, individuals as much as $250,000. 15 U.S.C. §§ 78dd-1 *et seq.*; 18 U.S.C. § 3571. The maximum fine may be increased to $2.5 million for corporations and $1 million for individuals in the case of certain willful violations. 15 U.S.C. § 78ff(a). Under the Alternative Fines Act, all criminal fines, including those imposed under the FCPA, may be increased to twice the gain obtained by reason of the offense or twice the loss to any other person. 18 U.S.C. § 3571.

Civil Penalties. Either the Department of Justice or the SEC may seek a civil fine of $10,000 against individuals and corporations that violate the antibribery provisions of the FCPA. 15 U.S.C. §§ 78dd-1 *et seq.* The SEC may bring an enforcement action seeking an additional fine, depending on the circumstances, of up to $500,000 or the gain obtained as a result of the violation. 15 U.S.C. § 78u(d)(3). Both the Department of Justice and the SEC may seek a court order enjoining violations of the FCPA. 15 U.S.C. §§ 78dd-1 *et seq.*

Indemnification Prohibited. The FCPA prohibits "issuers" as defined under the Act (including all public corporations) from paying the criminal and civil fines that may be imposed on an officer, director, employee, agent, or stockholder. 15 U.S.C. § 78ff(c)(3).

Collateral Consequences. Individuals and corporations that are found to have violated the FCPA may suffer collateral consequences such as exclusion or debarment from certain federal programs, ineligibility to receive export licenses, and suspension or debarment from the securities industry. Because violation of the FCPA is a predicate act under the Racketeer Influenced and Corrupt Organizations Act, a corporation or individual may be subject to additional civil or criminal actions, including a private RICO action by an aggrieved competitor or forfeiture proceedings by the government.

Exceptions and Defenses Under the FCPA. The FCPA contains several provisions that exempt certain conduct from its antibribery provisions.

Facilitating Payments for Routine Governmental Action. The FCPA does not prohibit "facilitating or expediting payment[s]" made to foreign officials for the purpose of causing them to perform "routine governmental actions." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). This provision is commonly referred to as the "grease payment" exception. In order to qualify for the exception, the payments must relate to the performance of routine, nondiscretionary government functions such as the issuance of routine licenses or the provision of phone service, power, and water. Congress intended the exception to apply only to small sums paid to low-level officials. 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4). The FCPA provides that "routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a party. Indeed, it is important to note that this exception is not carte blanche to make small bribes. Relying on this exception is very risky, as the government has provided little guidance regarding the qualifying conduct. Moreover, a facilitating payment that is permitted under the FCPA may still be unlawful under local law.

Payments Permitted by Written Laws. The FCPA does not prohibit payments that are lawful under the written laws and regulations of the foreign official's country. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1). This exception arguably would apply, for example, if a corporation followed a foreign country's written guidelines regarding permissible financial arrangements with managers of a state-owned business. We are not aware of any country, however, with written laws that permit bribery.

"Reasonable and Bona Fide Expenditures." The FCPA provides that it shall not constitute a violation of the statute if the person charged can prove that the payment in question constituted "a reasonable and bona fide expenditure, such as travel and lodging expenses" and that it was "directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof." 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2). Notwithstanding this affirmative defense, travel and lodging expenses intended to influence a foreign official's actions nevertheless violate the FCPA. Indeed, in 1994 the Department of Justice brought civil charges against a U.S. company, alleging that it used extravagant travel payments to influence the decisions and actions of a foreign government official in a position to affect the award of contracts to the defendant. (A copy of the civil charges describing the alleged conduct can be found on the Department's web site at www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E(i).pdf.)

Application of the FCPA to Foreign Subsidiaries. Corporations cannot insulate themselves from liability under the FCPA for actions taken overseas merely by moving foreign operations to a subsidiary. While it is true that the antibribery provisions of the FCPA do not explicitly make a parent corporation liable for violations committed by a foreign subsidiary, enforcement authorities are clearly prepared to employ other legal theories as a means of holding parent corporations responsible for the actions of their subsidiaries. Most importantly, as discussed below, the books-and-records provisions of the FCPA impose an obligation on corporate

parents to ensure compliance in their subsidiaries. Corrupt payments, of course, are almost never recorded accurately on a corporation's books, making every antibribery case a potential books-and-records case. As a result, corporations that fall within the SEC's jurisdiction should implement at the subsidiary level comprehensive policies directed specifically to the accuracy of recordkeeping.

More broadly, however, parent corporations have potential exposure for the actions of their subsidiaries to the extent that the parent controls in any way the operations of the subsidiary. Prosecutors have at their disposal several legal theories that can permit them to bring an action against a parent for its subsidiary's actions. The prosecutor might seek to establish that the subsidiary was acting as the parent's agent, or that the subsidiary was the "alter ego" of the parent. Similarly, the prosecutor might try to establish that the parent and subsidiary formed a single "integrated enterprise" or that the corporate veil should be pierced, destroying the corporate separateness between the organizations. To the extent that employees of the parent are directly involved in the affairs of the subsidiary, the government may seek to attribute to the parent responsibility for the actions of those employees under the legal theory of *respondeat superior.* Accordingly, corporations are well advised to ensure that their foreign subsidiaries have in place adquate corporate compliance policies and procedures.

Obtaining Advisory Opinions for Future Conduct. Under procedures promulgated by the Department of Justice, issuers and domestic concerns may seek and obtain "an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act." 28 C.F.R. § 80.1 (1992). Opinions issued by the Attorney General are published, albeit without specifically naming the companies and persons involved. While the opinions are binding only as to the requestor, the government's approach to specific fact situations can be a valuable source when evaluating proposed courses of action.

The Importance of Keeping Good Records. In complying with the FCPA, an organization cannot neglect its books and records. For those corporations that issue U.S. securities, the FCPA explicitly imposes recordkeeping and internal control requirements that extend to the company's foreign and domestic subsidiaries. It is, for example, a separate and independent violation for such a company to book as "consultant fees" money paid to a third party for other reasons, regardless of whether the funds actually can be traced to a foreign official. Indeed, more than nine of every 10 FCPA enforcement actions brought by the SEC arise from accounting violations, not bribery per se. Although the FCPA's accounting provisions apply only to issuers of securities in the United States, all organizations should focus on maintaining accurate financial records as a means of avoiding risky or suspicious payments. A Jones Day *White Paper* entitled "The Legal Obligation to Maintain Accurate Books and Records in U.S. and non-U.S. Operations," which details the Act's recordkeeping and internal control requirements, is available at www.jonesday.com.

GLOBAL EFFORTS TO CURB CORRUPTION

The last eight years have seen an unprecedented expansion of laws and international agreements modeled after the FCPA. The most visible early sign of this global effort was the OECD Antibribery Convention, signed in 1997. In total, the 30 OECD members plus six additional countries have signed the Convention, committing themselves to enacting laws that prohibit bribery of foreign officials. The signatories further agree to submit their laws and enforcement efforts to a review by the OECD, the results of which are then published by the organization. Since 1997, for example, all member countries of the European Union have enacted laws consistent with the Antibribery Convention. In some ways, enactment of the Convention has broadened the scope of anticorruption laws beyond the FCPA; for example, the definition of "foreign public official" under the OECD includes officeholders in international organizations such as the IMF and the World Bank.

Numerous other international bodies likewise have acted to curb corruption. On October 31, 2003, the United Nations General Assembly adopted the United Nations Convention against Corruption, which calls on member countries to pass laws criminalizing the payment of bribes. The United Nations Convention entered into force on December 14, 2005, following its ratification by 30 member countries. As of January 2006, 140 countries had signed the Convention and 43 had ratified it. Nations that ratify the United Nations Convention are obligated to pass laws criminalizing bribery of public officials, including officials of foreign countries and international organizations. The Convention further requires these countries to criminalize embezzlement, money laundering, and other corrupt endeavors. Indeed, the Convention goes so far as to enumerate enforcement methods to be adopted by individual countries, such as asset seizure, witness protection, cooperation among authorities, and extradition.

The Organization of American States ("OAS") adopted the Inter-American Convention Against Corruption on March 29, 1996. Under the terms of this Convention, each OAS member country is obligated to adopt legislation to criminalize the acceptance of corrupt payments by its government officials. The OAS Convention further requires member countries to criminalize the offer or grant of such corrupt payments to government officials, including officials of other countries. The OAS Convention obligates the member states to cooperate with respect to extradition and evidence gathering, specifically prohibiting the invocation of bank secrecy as a basis to refuse a request for information. The OAS Convention has been ratified or acceded to by the United States and all other OAS member states except Barbados.

It remains to be seen whether these international agreements will result in real enforcement of anticorruption laws outside the United States. The mere passage of such agreements, however, is a first step toward the creation of a consistent enforcement environment across national borders. In the meantime, as individual countries grapple with the difficulty of creating enforcement mechanisms, the United States is filling the gap with a newly vigorous approach to the FCPA.

Parties to the OECD Antibribery Convention. The following 36 countries have signed the OECD Antibribery Convention, committing themselves to anticorruption efforts: *OECD Members:* Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. *Non-OECD Members:* Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia.

RECOGNIZING RED FLAGS

Corporations and individuals can be held responsible for corrupt payments *even if they have no actual knowledge that bribes are being paid.* As noted above, the FCPA purports to impose criminal sanctions on persons who pay money to third parties with a reckless disregard for circumstances that suggest the money is being used for corrupt purposes. Thus, if an executive agrees to pay a consultant who in turn gives some of that money to a government official in exchange for official actions that benefit the corporation, the executive and the corporation may be guilty of violating the FCPA even absent actual knowledge of the corrupt payment. Whether the government believes that the company and its employees should be held liable for such indirect bribes largely depends on the existence of circumstances—so-called "red flags"—that should have put them on notice that corrupt payments were likely to occur.

The government has provided extensive guidance regarding the circumstances that it considers "red flags" for FCPA purposes. For example, the Department of Justice provides explicit guidelines in its "Lay-Person's Guide to the FCPA Statute." The December 2004 revision of that guide can be found at www.usdoj.gov/criminal/fraud/text/dojdocb.htm. In addition, enforcement actions by the SEC and DOJ often contain discussion of "red flags" that companies allegedly have ignored in their business dealings.

From these various statements by the SEC and DOJ, certain "red flags" appear particularly noteworthy:

Unusual Payment Patterns or Financial Arrangements. Generally speaking, bribes have come a long way from the proverbial bag of cash exchanged under the table. Nevertheless, improper payments made to foreign officials almost always are accompanied by unusual payment arrangements. Companies should use increased vigilance when asked to make payments for services in a bank account not located in either the country where the services were rendered or the country where the recipient of the funds is located. Similarly, the use of shell entities or aliases should result in heightened scrutiny of the transaction to ensure that it is not a vehicle for corrupt payments.

A History of Corruption in the Country. Although bribes may be paid or demanded in all countries, no one seriously disputes that certain nations—many in the developing world—see more than their fair share of corruption. When doing business in a country with a reputation for public corruption, corporations must be particularly suspicious of any activity that might suggest that bribes are being paid by their employees and agents. Enhanced compliance and training efforts often are in order. Thus, at a minimum, corporations doing business abroad should be familiar with the annual survey conducted by Transparency International. Additional resources regarding the prevalence of corruption in a particular country are available from the Department of State. International legal counsel can provide further details regarding the likelihood that bribes will be solicited or demanded in particular circumstances.

Countries With the Highest Perceived Level of Corruption. According to the annual survey of international experts conducted by Transparency International, the countries having the highest incidence of perceived corruption are: 1. (tie) Bangladesh, Chad, 3. (tie) Haiti, Myanmar, Turkmenistan, 6. (tie) Côte d'Ivoire, Equitorial Guinea, Nigeria, 9. Angola. *Source:* Transparency International Corruption Perceptions Index 2005, available at www.transparency.org/policy__and__research/surveys__indices/cpi/2005.

Rejection of Anticorruption Provisions. Corporations subject to the FCPA often ask a foreign joint venture partner to warrant that it will not (a) take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official or (b) take any act that would cause the U.S. firm to be in violation of the FCPA. To the extent that a prospective business partner refuses to agree to such a contract provision or other written certification, the corporations should be on alert that the partner does not intend to live up to those standards.

Unusually High Commissions. Commissions historically have been a vehicle through which bribes have been funneled to government officials. Accordingly, a request to pay unusually high commissions is a warning sign of possible corruption. A request to deposit commissions in multiple bank accounts, perhaps in offshore banks, also justifies additional scrutiny.

Lack of Transparency in Expenses and Accounting Records. As demonstrated by the books-and-records provisions of the FCPA, Congress and U.S. enforcement authorities view accurate books and records as a critical bulwark against corrupt payments. A lack of transparency in the books and records of a foreign business partner is a possible indicator of corrupt activity. If such a business partner seeks to shield expenses, accounting records, and other financial information from view, a possible motivation could be the desire to hide improper payments to government officials.

Apparent Lack of Qualifications or Resources. Corporations doing business abroad should be suspicious if a joint venture partner or representative does not appear capable of performing the services offered. Numerous enforcement actions have arisen from sham service contracts, under which corrupt payments are disguised using a consulting agreement or other ruse. Similarly, organizations and individuals doing business in a foreign country should be particularly wary of anyone who claims to have the ability to obtain licenses or other government approval without providing a description of the legitimate manner in which those goals will be accomplished.

Recommendation by a Government Official. Government officials need not demand a bribe directly in order to create potential FCPA liability for an organization or individual. Instead of demanding a bribe outright, a government official who is not a potential customer but exercises authority over a transaction may suggest that a particular third party be hired as a consultant or in some other capacity. Numerous enforcement actions have arisen from payments to third parties at the request of foreign government officials. Accordingly, any organization or individual doing business in a foreign country must be cautious when a government official suggests in any way that a particular third party be paid or hired.

CORPORATE COMPLIANCE PROGRAMS

Any organization seeking to do business lawfully and ethically in a foreign country should have in place a compliance program designed to detect and prevent corrupt payments to government officials. The benefits of such a program are twofold. First, an effective corporate compliance program will reduce the risk that employees in a foreign subsidiary will break the law out of ignorance or in the mistaken belief that paying bribes, although unlawful, is in the best interests of the organization. Second, in the event that an individual pays a bribe notwithstanding the organization's best efforts, a compliance program stands as tangible evidence of the organization's good faith. In the United States, for example, the existence of a corporate compliance program has been identified by the Department of Justice as one factor in deciding whether to bring charges against the corporation for the illegal actions of an employee. Likewise, corporations convicted of criminal charges in the United States are eligible to pay a lower fine if they have a corporate compliance program in place.

An effective FCPA compliance program will contain the following elements:

1. A policy or code of business ethics that prohibits corrupt payments to government officials.
2. Detailed procedures, standards, and guidance to address specific issues that might arise in the course of a company's operations.
3. Training programs designed to provide the appropriate education to each employee based on seniority, job responsibilities, geographic location, and line of business.
4. Systems to detect and investigate suspected violations, to monitor the effectiveness of the program, and to remedy violations.

The precise details of such a compliance program will vary, of course, from one company to another, depending on the size of the organization, the nature and location of its operations, and the degree to which its employees interact with government officials. Typically, however, an organization with significant overseas operations will include in its FCPA compliance program specific procedures for conducting due diligence of foreign consultants, agents, and business partners. The program also should set company policy regarding the use of contract terms relating to FCPA compliance, providing model language where appropriate.

The issues relating to the implementation of an effective corporate compliance program extend well beyond foreign corrupt payments and the FCPA, of course. Additional information regarding such programs is available on the Jones Day web site at www.jonesday.com/corporate_compliance_programs.

RECENT ENFORCEMENT ACTIONS

United States authorities brought an unusually large number of enforcement actions for violations of the FCPA in 2004 and 2005. At the same time, news reports suggest that other investigations are in the works, signaling that more enforcement actions can be expected. A brief summary of these reported matters provides valuable insight into the priorities and trends of foreign bribery enforcement in the United States.

Titan Corporation (2005). Titan Corporation settled criminal and civil charges of violating the FCPA and paid $28.5 million, the largest penalty ever imposed under the law. Titan had set up a joint venture with a government company in Benin in order to build a cellular telephone network. Titan was accused of paying $3.5 million to its agent, a business advisor to Benin's president, knowing that the money would be

used for such purposes as assisting the president's reelection campaign and purchasing earrings for the president's wife. In exchange, Titan allegedly received higher management fees. The charges further described unlawful payments made through agents in other countries around the world, as well as a pattern of ignoring internal warnings of fraud. The conduct at Titan came to light as a result of due diligence performed during merger negotiations. As a result of disclosures to the SEC and the public the merger was delayed and, ultimately, never consummated.

The Titan settlement further provided important insight into SEC policy regarding the significance of contractual representations and warranties asserting that a corporation has not violated the SEC. As was the case in the proposed Titan merger, such representations often are made public when they are attached to a proxy statement. In its Report of Investigation, the SEC stated that it would consider bringing an enforcement action in the event that such a publicly disclosed contractual provision contained materially false or misleading statements. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on potential Exchange Act Section 10(b) and Section 14(a) liability, Release No. 51283 (March 1, 2005).[1]

ABB Ltd. (2004). ABB Ltd. and two of its subsidiaries in the oil-services business paid $16 million in criminal and civil penalties as a result of $1.1 million in illegal payments made to government officials in Nigeria, Angola, and Kazakhstan. ABB Ltd., headquartered in Zurich, Switzerland, settled with the SEC for violating the FCPA's antibribery, books-and-records, and internal accounting controls provisions. ABB's U.S. and Scottish subsidiaries pleaded guilty to criminal violations of the FCPA in a plea agreement with the Department of Justice. It is noteworthy that the Scottish subsidiary pleaded guilty to a criminal violation of the FCPA, even though neither that company nor its parent is a U.S. entity. This reflects the government's growing willingness to use the FCPA's extraterritorial jurisdiction. Like the Titan case, the ABB investigation was initiated as a result of disclosures made in the course of a corporate transaction; unlike Titan, this transaction ultimately was completed. ABB is reported to have made additional disclosures to the SEC in April 2005 and February 2006 of possible corrupt payments to officials in Latin America and the Middle East.

InVision (2005). Once again, a due diligence review conducted prior to a merger uncovered possible bribery of foreign officials in connection with a company's foreign operations. In this case, the acquisition target was InVision, a manufacturer of explosive detection devices. During the course of the due diligence, InVision notified the U.S. authorities that its distributors in Thailand might have paid or offered to pay bribes to officials or politicians. InVision settled with the SEC before completing the merger, agreeing to disgorge $589,000 in profits and pay a $500,000 civil penalty. Organizations looking to improve the effectiveness of their compliance programs should note that InVision's liability arose from payments made by its *distributors,* rather than its own employees. Controlling the actions of distributors and other agents can be difficult, of course, but this settlement reinforces the notion that organizations disregard possible bribery by their foreign agents at their own peril.

Monsanto Company (2005). Monsanto, a producer of technology-based solutions and agricultural products, paid a $1.5 million penalty to the SEC and another $1 million to the Department of Justice to settle alleged violations of the FCPA. According to the government's charges, Monsanto paid $750,000 to Indonesian government officials, including a $50,000 cash payment to a senior Ministry of Environment official that was disguised as consulting fees. The cash payment allegedly was intended to cause the official to reverse a government decree that adversely affected Monsanto's business in Indonesia. The settled SEC actions accused Monsanto of violating both the antibribery and books-and-records provision of the FCPA. The Department of Justice filed a criminal information charging a violation of the FCPA's antibribery provision, but then entered a deferred prosecution agreement under which the charges would be dismissed if the company would comply with various obligations, includ-

1. For an analysis of the SEC Report and its impact on merger agreement representations, see Jones Day Commentaries, "Merger Agreement Representations Take on a Life of Their Own," available at www.jonesday.com.

ing the implementation of an FCPA compliance program and retention of an independent compliance monitor for three years.

Micrus Corporation (2005). The government entered a deferred prosecution agreement with Micrus Corporation, a manufacturer of medical equipment, following the voluntary disclosure of improper payments to doctors employed at publicly owned hospitals in France, Germany, Spain, and Turkey. Micrus disclosed to the government that it paid the doctors $105,000 disguised as stock options, honoraria, and commissions in order to cause the hospitals to purchase embolic coils from Micrus. An additional $250,000 was paid by Micrus without first obtaining prior administrative or legal approval required by the foreign jurisdiction. Pursuant to the agreement with the government, Micrus will avoid prosecution under the FCPA if it complies with requirements that include implementing an FCPA compliance program, retaining an independent compliance expert for three years, and paying a $450,000 penalty.

Diagnostic Products Corporation (2005). Following a voluntary disclosure by the company to the U.S. government, Diagnostics Products Corp. paid penalties totaling $4.8 million for violating the antibribery provisions of the FCPA. The company disclosed to the government that it paid $1.6 million in bribes to obtain laboratory testing business from state-owned Chinese hospitals.

Azerbaijan's State-Owned Oil Company (2005). Three individuals—two Americans and one Czech—were indicted in New York under the FCPA for allegedly paying $11 million in bribes to senior Azerbaijani officials in an attempt to gain control of the country's state-owned oil company.

The United Nations Oil-for-Food Programme (2005). An independent inquiry committee of the United Nations chaired by former Federal Reserve Chairman Paul Volcker issued two lengthy reports detailing its findings that corporations and individuals paid millions of dollars in bribes to officials of the Iraqi regime of Saddam Hussein in exchange for the right to purchase oil under the United Nations Oil-for-Food Programme. The report provided details and documentary evidence to authorities, who may use the evidence to pursue prosecution of those individuals and corporations involved in the alleged bribery schemes.

DaimlerChrysler (2005). The Department of Justice and the SEC were reported to have instituted an investigation into allegations that DaimlerChrysler paid bribes in at least a dozen countries in violation of the FCPA. The investigations by the SEC and the DOJ allegedly stemmed from a civil lawsuit in which a fired Chrysler accountant accused the company's Mercedes unit of maintaining dozens of secret bank accounts in order to bribe foreign officials.

HealthSouth (2004). The Department of Justice indicted two former officers of HealthSouth Corporation with violating the FCPA by allegedly agreeing to bribe the director general of a Saudi Arabian foundation in order to secure an agreement to manage a hospital in Saudi Arabia. The indictment charged that HealthSouth agreed to enter a bogus consulting contract under which the director general would receive $500,000 per year for five years. The indictment further alleged that the officers took this action after being advised by outside legal counsel that it was prohibited by federal law. One of the indicted officers was the company's vice president of legal services. Earlier in 2004, two other HealthSouth officers pleaded guilty to charges related to the alleged bribery scheme.

Nigeria (2004). The U.S., French, and Nigerian governments are reported to have initiated investigations into a consortium that allegedly directed bribes to Nigerian officials in exchange for government contracts. At least one U.S. company is reported to be a member of the consortium that channeled $40 million in unlawful payments to Nigeria's dictator through a British lawyer who was retained to obtain government permits and maintain good relations with government officials.

Equatorial Guinea (2004). The SEC is reported to have commenced an investigation into alleged payments made to government officials of Equatorial Guinea by American oil companies. The investigation resulted from an inquiry by the Senate's Permanent Subcommittee on Investigations into regulatory problems at Riggs Bank where the Equatorial Guinean government maintained deposits of approximately $700 million in cash and investments.

Enforcement Trends.

1. Investigations and prosecutions of corporations have increased markedly over the last five years.
2. Due diligence in corporate transactions frequently results in self-disclosure of violations by companies seeking to resolve matters before consummating an acquisition.
3. The SEC and DOJ are asserting the broad jurisdictional authority of the FCPA, bringing actions against non-U.S. entities.
4. Notwithstanding the OECD, the United States continues to be the primary force behind enforcement actions arising from foreign corrupt payments.
5. Settlements of FCPA enforcement actions increasingly require corporations to implement compliance programs, sometimes with third-party monitors.
6. The DOJ is showing a willingness to enter deferred prosecution agreements, allowing those organizations that self-report and cooperate to avoid criminal charges.
7. The SEC has asserted a willingness to bring enforcement actions based on the public disclosure of contractual provisions that falsely or misleadingly assert compliance with the FCPA.

OUTLOOK

Every indication suggests that enforcement of anticorruption laws will continue vigorously in 2006 and 2007, inasmuch as the factors that have driven the increase in enforcement over the last few years are not likely to abate. Perhaps most importantly, the public institutions that enact and enforce such laws appear to be committed to fighting international corruption. Authorities in the United States and the European Union, as well as officials in the United Nations and other multinational organizations, continue to express a desire to reduce corruption worldwide. Moreover, countries that are party to multilateral agreements—the OECD, the OAS Convention, and the United Nations Convention—are obligated to enact and enforce anticorruption laws. Even a marginal increase in enforcement activity by countries outside the United States could result in dramatic increases in the number of actions brought against organizations and individuals worldwide. Historically, such changes in government priorities have yielded disproportionately large numbers of enforcement actions, since private actors are slow to conform their actions to the new rules.

At the same time, organizations that do business in the United States continue to increase their focus on compliance-related initiatives. This is particularly true of publicly traded companies and others subject to the Sarbanes-Oxley Act of 2002. One consequence of that focus has been a constant flow of FCPA-related voluntary disclosures to the Department of Justice and the SEC. Indeed, it appears to have become a permanent feature of corporate transactions that the acquiring company will demand the investigation and disclosure of noncompliance with the FCPA and other laws before the transaction can be completed.

Finally, and most importantly, we have not seen any slackening in the pace at which business is becoming global. As a result, an ever-increasing number of business organizations from the United States and the European Union are venturing into developing countries. Each of these businesses is at risk of encountering practices that are at odds with its own corporate culture and the laws of its home jurisdiction. Unless these organizations have in place an effective, comprehensive compliance and business ethics program *before initiating international operations*, some percentage will run afoul of the FCPA and other similar laws prohibiting foreign corrupt practices.

ADDITIONAL INFORMATION REGARDING THE FCPA

Jones Day *White Papers* discussing the FCPA and recent developments under the law include:

- "2006 Update on Transnational Antibribery Laws: The United States Foreign Corrupt Practices Act, International Conventions, and Recent Enforcement Actions"
- "The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations."

Both of these documents are available on the Jones Day web site at www.jonesday.com.

LAWYER CONTACTS

For further information, please contact your principal Jones Day representative; the author of this *White Paper*, R. Christopher Cook (1.202.879.3734; christophercook@jonesday.com); or one of the lawyers listed below. General e-mail messages may be sent using our "Contact Us" form, which may be found at www.jonesday.com.

Atlanta
Richard H. Deane, Jr.
1.404.581.8502
rhdeane@jonesday.com

George T. Manning
1.404.581.8400
gtmanning@jonesday.com

Beijing
Marcus Woo
86.10.5866.1191
mwoo@jonesday.com

Chicago
Daniel E. Reidy
1.312.269.4140
dereidy@jonesday.com

James C. Dunlop
1.312.269.4069
jcdunlop@jonesday.com

Cleveland
John P. Dunn
1.216.586.7095
jpdunn@jonesday.com

Stephen G. Sozio
1.216.586.7201
sgsozio@jonesday.com

Frankfurt
Marijon Kaysser
49.69.9726.3933
mkaysser@jonesday.com

Los Angeles
Frederick D. Friedman
1.213.243.2922
ffriedman@jonesday.com

Brian O'Neill
1.213.243.2856
boneill@jonesday.com

Brian A. Sun
1.213.243.2858
basun@jonesday.com

London
Hugh W. Chapman
44.20.7039.5200
hchapman@jonesday.com

Sion Richards
44.20.7039.5139
srichards@jonesday.com

New York
Charles Carberry
1.212.326.3920
carberry@jonesday.com

Mark A. Haddad
1.212.326.3423
mahaddad@jonesday.com

San Francisco
Martha Boersch
1.415.875.5811
mboersch@jonesday.com

Shanghai
Beth Bunnell
86.21.2201.8003
babunnell@jonesday.com

Peter J. Wang
86.21.2201.8040
pjwang@jonesday.com

Washington, D.C.
R. Christopher Cook
1.202.879.3734
christophercook@jonesday.com

J. Lawrence Manning, Jr.
1.202.879.3853
jmanning@jonesday.com

Mary Ellen Powers
1.202.879.3870
mepowers@jonesday.com

Peter J. Romatowski
1.202.879.7625
pjromatowski@jonesday.com

Michael R. Shumaker
1.202.879.4676
mrshumaker@jonesday.com