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The U.S. Foreign Corrupt Practices Act

More enforcement and more risks for companies and individual employees doing business around the globe

It was the guilty plea heard around the world. In December 2008, Siemens AG and three of its subsidiaries pleaded guilty to violations of the U.S. Foreign Corrupt Practices Act (FCPA) and paid $800 million in fines to the U.S. Department of Justice (DOJ) and the U.S. Securities & Exchange Commission (SEC). On top of that, the company paid $450 million for violating German anti-corruption law.

The Siemens case, in which American and German officials worked closely together, highlights an area of the law that is increasingly coming under the microscope— anti-corruption, especially in regards to fraud and corruption in international business.

"The number of cases prosecuted through criminal enforcement has gone up significantly in the past couple of years," says Deputy Chief Mark F. Mendelsohn of the Department of Justice. According to Mendelsohn, the DOJ currently has more than 100 active FCPA investigations. This year, the DOJ and SEC have filed FCPA enforcement actions against multiple companies as well as individual executives.

While in-house counsel at large, multinational corporations may be very familiar with the FCPA, the particulars of the statute can trip up unsuspecting companies and employees who run smaller cross-border operations.

"In-house counsel may think they know what the FCPA is," says Michael Koehler, an assistant professor of business law at Butler University. "They view it as a bribery statute, which it is. But it's about more than suitcases full of cash."

In fact, business development activities that many companies consider routine in dealings with private entities, such as entertaining clients, offering tickets to sporting events and sending holiday gifts, may violate the FCPA when directed towards individuals considered foreign officials under the FCPA, such as employees of state-owned entities, according to Ross Booher, a partner at Bass, Berry & Sims PLC, Lex Mundi's member firm for Tennessee. "The requirements of the FCPA are not always intuitive," says Booher. "Even highly experienced in-house counsel are often surprised at the types of activities that can result in FCPA exposure."

What Can In-House Counsel Do to Ensure Compliance?

The FCPA was enacted in 1977 and contains two sets of provisions. The anti-bribery provisions, which apply to individuals as well as public and private entities, prohibit directly or indirectly offering "anything of value" to a foreign official for the

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Lex Mundi Criminal Liability of Companies Survey:

The Lex Mundi Business Crimes and Compliance Group has published a related multi-jurisdictional survey entitled "Criminal Liability of Companies" that addresses key criminal offense laws in countries around the world. Topics addressed in the survey include the different types of sanctions imposed on a company and their legal prerequisites. Visit **www.lexmundi.com/CriminalLiabilitySurvey.**

purposes of corruptly influencing that official. Under the books and records provisions, public companies must "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." Public companies must also maintain a system of internal compliance controls that "provides reasonable assurances that transactions are executed in accordance" with Generally Accepted Accounting Principles (GAAP).

However, even large, multinational companies are finding themselves targeted for FCPA violations. "We are now seeing major companies getting caught up in this, which is not what one would expect," says Ellen S. Podgor, a professor of law at Stetson University College of Law. Deputy Chief Mendelsohn points to several factors driving the increased prosecutions, including the Sarbanes-Oxley Act, which has focused attention on corporate internal controls. The DOJ, SEC and FBI have also been devoting more resources to the FCPA at a time when international authorities are increasingly cooperating to target violators, as German and U.S. officials did in the Siemens case.

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> Bass, Berry & Sims PLC

International standards are also changing dramatically, and a number of countries are developing their own FCPA-like laws. So far, 38 countries have ratified the Organisation for Economic Cooperation and Development's (OECD) Anti-Bribery Convention, and a global standard for business transactions was on the agenda at the July G-8 meeting in Italy.

The current financial environment may only make complying with the FCPA more difficult, according to Mendelsohn. "I'm personally very concerned about the effect the global economic crisis will have," he says. His concerns are two-fold. First, companies under budget pressures may be tempted to cut back on their compliance programs and training. And, secondly, the funds flowing from government stimulus efforts around the world may offer increased incentives for FCPA violations. "These will involve a fair amount of government spending on public works," he says. "That can be an invitation to corruption."

Companies of all sizes face challenges when it comes to the FCPA, says Podgor. Smaller companies may lack the resources of larger companies to develop and police their compliance policies; larger companies have more employees who need to be educated and tracked regarding compliance measures.

Companies looking to develop or strengthen their anti-corruption measures can begin with the compliance programs they have in place, even if they are not related to the FCPA. "But they should eventually implement FCPA-specific policies," says Koehler. "They should also do a [global] risk profile. Their risk will be less if they are doing business in developed countries than in emerging markets."

As more countries develop their own anti-corruption laws, it is even more important that in-house counsel ensure their company's practices are consistent with local legal requirements, says Booher. "You need to work with local counsel who are experts in the laws, language, customs and risk factors in their jurisdiction."

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The member firm lawyers in the Lex Mundi Business Crimes and Compliance Group have vast experience in handling criminal investigations and prosecutions and in dealing with requests for mutual legal assistance. They can also offer proactive and preventative advice as well as knowledge and expertise to protect clients' interests in criminal and other investigations. To contact a member in this group, visit **www.lexmundi.com/BusinessCrimes**.

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Lex Mundi and its member firms have published many useful multi-jurisdictional publications that are available free of charge. To learn more, please visit the "Publications and Resources" section of the Lex Mundi website at **www.lexmundi.com**.

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Potential Conflicts with the FCPA

Australia has a stable government with a low level of corruption and few customs or practices directly contrary to the FCPA. Nevertheless, there are some industries, including energy and power, where government plays an important role. Perhaps more importantly, Australian companies operating overseas, in particular elsewhere in the Asia-Pacific, should be aware that the Australian government has issued a mandate to investigate and prosecute all credible allegations of corruption. This mandate is of major concern to companies that are involved in large oil and gas, mining and resources, agriculture, pharmaceuticals, and telecommunication and technology projects.

Navigating Local Anti-Corruption Law

Australia is a signatory to the OECD convention and has enacted provisions in its Criminal Code functionally equivalent to the FCPA. Any attempt by a company or individual to bribe a foreign official whilst in Australia, or any attempt by an Australian citizen, resident or company incorporated in Australia to bribe a foreign official whilst overseas, may breach Australian law. Companies can be held criminally responsible for the acts of their agents and employees and as such they must take all reasonable steps to create and maintain a corporate culture that requires compliance and ensures that their employees do not commit foreign bribery offences.

Clayton Utz has advised and assisted clients in the mining and medical industries about the risks surrounding bribery, corruption, facilitation payments, privileges and immunities. They have provided advice, conducted risk management audits and assisted with investigations.

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Potential Conflicts with the FCPA

Canada's social and business customs are similar to the United States. An overt request for a bribe is rare; however, the exchange of small gifts, meals, entertainment and tickets to sporting events is prevalent. Interaction with government employees and officials is also a routine part of doing business. Federal, provincial and municipal governments are significant purchasers of goods and services, and Crown corporations are active in a number of sectors. It is also common for businesspersons to have regular dealings with government regulators.

The Canadian Criminal Code prohibits the provision of any benefit to government employees, including employees of Crown corporations. Unlike the FCPA, the benefit need not be given to obtain or retain a business advantage and there is no exception for reasonable expenditures to develop a business relationship or facilitation payments. Accordingly, local Canadian anti-corruption laws can be more restrictive than the FCPA.

Navigating Local Anti-Corruption Law

Canada also has similar legislation to the FCPA – the Canadian Corruption of Foreign Public Officials Act ("CFPOA"). The CFPOA and FCPA are analogous but not identical; while both have anti-bribery provisions, the CFPOA does not contain accounting and record-keeping provisions. Until recently, the CFPOA has only been the subject of minimal enforcement efforts by Canadian authorities. This, however, is changing. The Royal Canadian Mounted Police has recently established a special unit dedicated to investigating international bribery and enforcing the CFPOA.

Blake, Cassels & Graydon LLP has significant experience assisting foreign and domestic companies navigate Canadian anti-corruption law. Blakes is the Lex Mundi member firm for Alberta, Ontario and Québec, Canada.

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Potential Conflicts with the FCPA

In principle, there are no identified accepted practices that potentially conflict with the FCPA. The anti-corruption laws sanction a broad range of corrupt conducts and provide different forms of prosecution. Criminally sanctioned conducts include, among others, bribery, negotiations with conflict of interest, several types of fraud against the National Treasury, and even the unjustified increase of the net worth of public officers.

There is significant state involvement in mining, oil and gas, health—with many hospitals and ambulatory centers state-owned or -controlled, ports—with the state controlling the main ports, railroads, banking and finance and the media.

Navigating Local Anti-Corruption Law

Chile's interest in joining the OECD lead to revamping the State Administration Act in areas like probity and transparency, and the Criminal Code in areas such as corruption acts of foreign officers and access to public information.

Criminal sanctions on bribery have been rarely applied. Fraud against the National Treasury by public officers along with private third parties has been effectively prosecuted but with relatively low sanctions.

Administrative laws establish certain general parameters, sometimes through example-rules e.g. the State Administration Act provides that it is specifically against probity to solicit or accept advantages or privileges, except for "official and protocol donations and such donations authorized by customs such as manifestations of courtesy and politeness". Internal manuals of public entities provide that a public officer cannot accept any benefit that may jeopardize its independence.

There are specific laws on political contributions and transparency in public entity contracts as well.

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Potential Conflicts with the FCPA

As a cultural society with a complex bureaucratic system, there is a built-in tradition of bestowing gifts during festivities as either a token of appreciation or display of hospitality. On close scrutiny these might conflict with FCPA mandates and other national conduct rules or legislation, which are even more sensitive than the FCPA to the receipt of gifts and facilitation payments.

The Indian Government participates actively through its public sector undertakings by joint ventures in oil, gas, infrastructure and healthcare projects, making its influence over commercial sectors substantial and interaction with the public sector crucial as it influences and expedites execution and enforcement.

Navigating Local Anti-Corruption Law

The Prevention of Corruption Act, 1988, is the primary legislation dealing with corruption and bribery amongst public servants. The Indian Penal Code, 1860, and Representation of the People Act, 1951, have specific provisions regulating bribery and/or corruption during elections, which apply to both public and private sectors. Public servants are also guided by a host of departmental and service rules which impose a higher degree of accountability. This accountability is emphasized by the existence of governmental departments such as the Central Vigilance Commission, which inquires into such acts. Additionally, private entities follow their internal codes of conduct.

As a firm, we provide guidance to our international clients on the aforementioned laws and also participate in the drafting of in-house manuals. We advise our domestic clients to educate their employees on FCPA and local anti-corruption laws, adopt strict compliance programs and impose adequate checks and balances to detect the occurrence of bribery or corruption.

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Potential Conflicts with the FCPA

Although there have been significant developments in the law and in the customs (also due to important criminal investigations that have recently taken place related to corruption of high officials), social customs in Portugal, especially the ones related to the offer of small courtesy gifts, may raise some conflicts with the FCPA. This may happen in particular in smaller municipalities where officials are involved in a number of businesses and where some offers related to approvals and permits are still frequent (although prohibited by law if intended to influence decision making procedures). We can find some state-owned companies in public transportation, water supply and the post office, among others. In other areas, such as telecommunications, energy and oil, there is also some state control, not only due to state participation in these companies' capital, but also due to golden shares.

Navigating Local Anti-Corruption Law

Since 2001, with the implementing legislation of the OECD Convention, laws against corruption, both in the public and private sector, as well as in international business, have been developed. Nowadays, Portugal has strong criminal legislation related to corruption and recently created a Prevention of Corruption Council, as well as special investigation units that have developed compliance and enforcement of the law. Additionally, specific legislation regarding measures in the fight against corruption was put into practice. It should be noted that in 2008 new rules on the territorial application of the laws related to corruption in international business and in the private sector were adopted. Portugal has also ratified the UN Convention against Corruption.

MLGTS Business Crimes and Compliance Practice Group has had the opportunity to assist international clients in addressing and adapting the companies procedures to national legislation.

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Potential Conflicts with the FCPA

Corrupt activities in one jurisdiction may have legal consequences halfway around the world. Corruption legislation like the FCPA and PACCA (referred to below) provide for extra-territorial operation of their provisions. The provisions of the FCPA are not consistent with the provisions of South African Laws in all respects. For example, facilitating and expediting payments are permissible under the FCPA but would render the person liable for prosecution under South Africa Law. The government is a significant stakeholder in commercial enterprises in the country. Examples of state owned enterprises include Eskom (responsible for 95 percent of the electricity supply) and Transnet, which operates port and rail infrastructure in the country.

Navigating Local Anti-Corruption Law

South Africa has ratified the OECD Convention. The principle legislation giving effect to the Convention is the Prevention and Combating of Corrupt Activities Act (PACCA). The Act prescribes a general offense of corruption and specific corruption offenses relating to, for example, contracts, tenders and auctions. The Act establishes a duty on persons in positions of authority to report any suspicion of corruption, theft or fraud involving more than R100 000.00 to the police, and also creates a register where the particulars of companies convicted of tender or contract corruption are to be endorsed. Other legislation like the Prevention of Organised Crime Act, the Financial Intelligence Centre Act and The Public Finance Management Act may also apply.

Bowman Gilfillan has a dedicated forensic and white collar crime practice area and regularly provides detailed advice and training to clients to ensure compliance with South Africa Law.

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Potential Conflicts with the FCPA

Thailand has strengthened its anti-corruption policy in recent years. The National Counter Corruption Commission (NCCC) has initiated increased investigations and obtained numerous high-profile convictions. Thai laws do not conflict with the FCPA, but rather complement its enforcement. Most recently, the NCCC worked closely with U.S. investigators in connection with the GE/InVision case regarding luggage scanners and the Green case involving the Bangkok Film Festival, with both governments applying their laws in cooperation to thwart corruption that extends across national borders.

Differences, however, do exist. For example, gifts to civil servants or officials during holidays—a long-standing Thai custom—are acceptable under Thai law provided that they are less than THB 3,000 (approx $85) and not intended as quid pro quo for any benefit in return. Currently, world attention has focused on Thailand's customs laws which entitle individual officials to receive a commission on penalties for false customs reporting/undervaluation. Parties have alleged that such practice leads to seizure without cause.

Navigating Local Anti-Corruption Law

Thailand's primary law in this sector is the Organic Act on Counter Corruption (OACC), enacted in 1999 and amended in 2007. The OACC has been amplified in effect by Ministerial Regulations and Notifications issued by the NCCC. Our offices have advised Fortune 500 companies on the interrelationship of the FCPA with Thai law, specifically with respect to public procurement projects and dealings with officials in regulatory matters as well as advising the Thai government in matters of cooperation with the United States.

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Potential Conflicts with the FCPA

Most international businesses are surprised when first confronted with the strict anti-corruption requirements imposed by U.A.E. law where prohibitions are broader than those of the FCPA and the OECD Anti-Bribery Convention.

Scattered provisions of U.A.E. law contain anti-corruption rules, including statutes and regulations on bribery, government purchases and public employees. Some statutes have been amended to allow public employees to have outside business interests, while amendments to the Federal Penal Code have extended anti-corruption rules into the private sector, enabling some recent high-profile prosecutions.

Navigating Local Anti-Corruption Law

Foreign businessmen must be concerned with conflict of interest legislation for various reasons, including the undesirability of being associated with prohibited conduct.

In one category of prohibitions, the giving and taking of bribes is made criminal under several statutes; however, these statutes do not take a uniform approach to the prohibition of bribery. In addition, local law contains no "safe harbor" for gifts and tokens of small monetary value. Afridi & Angell has participated recently in developing a protocol for a major U.S. defense manufacturer guiding its personnel on when and how ordinary business courtesies may be permissibly extended.

As a firm, we are able to advise clients on how to comply with the competing requirements of multiple legal systems. We routinely advise clients on documenting FCPA compliance in a manner effective for the local regulatory and business environment; and we also advise clients on other U.S. laws with extra-territorial impact, such as anti-boycott law and export controls.

www.afridi-angell.com

and its corporate Web site provides detailed information about its energy use and efforts to offset its direct and indirect CO_2 production.

"It's a little bit of a competition to show that you're reducing [carbon emissions]," he says. "What it means to reduce them depends a lot on whether you're reducing total emissions or showing that you're making more efficient use of electricity."

Scoring a Star

One tactic to rein in data center energy use is the EPA's proposal to apply the Energy Star rating system to data center efficiency. Consumers commonly find the small blue Energy Star stickers on appliances such as refrigerators or washing machines that meet the program's efficiency guidelines. At press time, the EPA was still gathering information to help it develop the data center rating.

Energy Star ratings would help a company with a data center compare its center's performance to those at other companies, as well as evaluate how efficiently its own specific facility operates compared to other buildings the corporation runs.

Though no Energy Star rating exists for data centers yet, in May the computer servers housed in data centers became subject to Energy Star specifications—one step toward creating a rating system for the facilities themselves. The EPA-drafted specifications set minimum efficiency standards for servers to qualify for the rating. Server manufacturers will need to report the entire range of energy the rated servers could use, depending on whether they're idle or running at full steam. The EPA has pledged to develop and implement the second tier of more refined server specifications no later than October 2010.

From a consumer's perspective, data center efficiency ratings won't necessarily be helpful because several companies may use a single data center facility, Benfield says. But the data centers themselves will have to be very concerned about the standards if Congress passes federal legislation governing indirect emissions.

"If we're going to do a cap-and-trade system, then we're going to allocate carbon credits to specific industries and then require them to ratchet down their emissions over time," Benfield says. "People haven't looked at data centers as one of the larger consumers of those credits, but we need to look at where those emissions are really coming from."

Pioneering Partnerships

Because the power companies that feed data centers would actually bear the brunt of buying carbon credits, companies with data centers will feel the cost of cap-and-trade through larger electric bills.

"There's a big incentive for power companies and data centers to work together," says David Cranston, chair of Greenberg Glusker Fields Claman & Machtinger's environmental group. Such partnerships could be a win-win situation, saving both entities a lot of money, he says.

And the faster data centers act to reduce their energy consumption, the less likely it is government agencies will impose strict regulations of their own, Cranston says. He considers the Waxman-Markey bill's stance on data centers a soft start to regulating them—but that could change if data centers don't decrease power usage on their own.

"Companies should accelerate voluntary efforts to achieve energy efficiency," he says. "Use the extra cost of potential regulatory compliance to motivate your engineers to come up with better, cheaper ways to do things."

The upfront cost of moving data center operations offsite to a cooler climate that naturally chills servers, for example, could save big money in the long run if it prevents the EPA from implementing tough regulations. During the past two years, Yahoo! has built data centers in Washington state outfitted with next-wave cooling technology that uses frigid air sucked from outside along with chilled water to air condition the servers.

As Kahn says, "These things are so expensive to run anyway, there's plenty of incentive to be efficient right now." ■

Siting Sanctions

WHILE DATA CENTERS PRODUCE MOST OF THEIR EMISSIONS INDIRECTLY, onsite backup generators can be a huge source of CO_2. Because data centers need to run uninterrupted 24 hours a day, they require instant power in the event of a blackout at the local power plant—and that can create a lot of pollution in a short amount of time.

But when building the facilities, many companies overlook these potential outbursts of pollution and improperly site the crucial generators, says Jeffrey Hunter, a partner at Perkins Coie.

"Emergency generators don't have pollution control equipment," he says. "It's not like your typical power plant that's running 24/7 and is a Title V source putting in all these controls." (EPA-granted Title V permits clarify operating requirements for sources of air pollution.) With some data centers hosting up to 40 generators, overlooked permits could lead to some hefty fines.

Hunter recommends looking at the rules in each state where the company wants to site a data center, because permit requirements vary across the country. "You don't typically think of the data center as a power plant," he says. "But it very well is a power plant because you need the emergency generators to provide energy."