BRIEFING

NEW GUIDANCE FROM DOJ AND SEC ON THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT

INTRODUCTION

The enforcement of the US Foreign and Corrupt Practices Act ("FCPA") is the responsibility of the Department of Justice ("DOJ"), and the Securities and Exchange Commission ("SEC"). On 14 November 2012 these agencies issued a joint guidance document setting out their approach to the Act. Whilst it makes clear that combating corruption remains a continuing priority, the document does not appear to mark any fundamental shift in approach. It rather attempts to assist companies and individuals in avoiding, detecting and preventing FCPA violations. The OECD Working Group on Bribery has previously commended the United States' approach to anti-corruption. It also noted, however, that these efforts would be assisted by consolidated publicly available information of the FCPA. At least in part, this guidance serves to fill that gap.

THE ANTI-BRIBERY PROVISIONS

The FCPA prohibits offering, promising, or authorising payment to a foreign official in order to influence his official acts or decisions, or to secure any improper advantage, in order to obtain or retain business.

Jurisdiction

The ambit of the FCPA is complex. Essentially, it distinguishes between three types of persons/companies:

(i) "issuers" – any company with a class of securities listed on a national securities exchange in the United States. Officers, directors, employers, agents and stockholders acting on the "issuers'" behalf will be caught by the Act.

(ii) "domestic concerns" – a citizen, national or resident of the United States, and any corporation organised under United States law, or with its principal place of business in the United States. Again, officers, directors, employers, agents, stockholders are covered.

The FCPA anti-bribery provisions apply to both "issuers" and "domestic concerns" if they make use of United States mail or any form of "interstate commerce" in furtherance of an offence. "Interstate commerce" includes any trade, transport or communication between States or between a foreign country and any State. Consequently, a single telephone call or email in furtherance of a bribe which goes to, from or through the United States will bring the offence within the jurisdiction of the FCPA.

(iii) Other foreign nationals or entities will also be caught if they engage in any act in furtherance of an offence whilst in United States' territory. For example, if they attend a meeting in New York to discuss bribing foreign officials. Again, their officers, directors, employers, agents, stockholders may be subject to the FCPA.

In addition to this framework, following an amendment to the FCPA, all US companies and persons are now liable even if they act entirely outside the United States.

It is important to note that anyone who aids and abets an offence, or conspires in the commission of such an offence, is also liable even if they would not otherwise fall within the scope of the FCPA. For example, the United States will have jurisdiction to prosecute *all* conspirators if just one of them is an issuer.

Gifts and hospitality

Appropriate gifts and hospitality do not contravene the FCPA. Such gifts can, however, be used to mask corrupt payments. The more extravagant the gift, the more likely that it will be considered to have been given with an improper intention. The guidance emphasises the importance of transparency – gifts should be given openly and then properly recorded. A company should have clear and accessible guidelines in place to cover these processes. Larger companies may benefit from gift-giving clearance procedures.

Charitable donations

Companies may be asked to make charitable donations as part of a contractual negotiation with a foreign government. Proper due diligence checks and suitable controls are critical in such cases to ensure the gift is not in fact a bribe. The guidance highlights certain due diligence measures which *may* be appropriate, including:

- Certification by the recipient regarding compliance with the FCPA;
- Due diligence to confirm that none of the recipient's officers are affiliated with the foreign government;
- A requirement that the recipient provides audited financial statements;
- A written agreement with the recipient restricting the use of funds;
- Steps to ensure the funds are transferred to a valid bank account;
- On-going monitoring of the efficacy of the charity.

Facilitating payments

The FCPA does not apply to 'facilitating payments'. This term covers routine, non-discretionary governmental acts – e.g. processing visas, providing police protection, or the supply of utilities. Although such payments do not breach the FCPA anti-bribery provisions, if they are not properly recorded in the company accounts they may constitute a breach of the FCPA accountancy

provisions. They may also constitute an offence in the particular country concerned. It is important to note that such payments are prohibited under the UK Bribery Act 2010.

Successor liability

Generally when a company merges or acquires another, it inherits the predecessor company's liabilities – including violations under the FCPA. Consequently, the guidance stresses the importance of due diligence checks before taking such a step. Where potential FCPA violations are unearthed prompt action is required. In a significant number of instances the DOJ and SEC have declined to prosecute companies which have voluntarily disclosed and remediated such violations. In general they have only taken action in cases involving egregious and sustained violations or where the successor company failed to stop the misconduct continuing after the acquisition.

GUIDING PRINCIPLES OF ENFORCEMENT

The DOJ will prosecute an individual where the evidence allows unless:

No substantial federal interest would be served;

The person is subject to effective prosecution in another jurisdiction;

An adequate non-criminal alternative to prosecution exists.

In considering a plea bargain, the DOJ will weigh the seriousness of the offence with the person's willingness to cooperate and the desirability for a prompt disposition to the case.

For corporate defendants, in considering whether to prosecute, or negotiate a plea or enter into a deferred prosecution agreement, the following factors must be considered:

- The nature and seriousness of the offence;
- The pervasiveness of the wrongdoing within the corporation;
- The corporation's history of previous misconduct;
- Any timely and voluntary disclosure and willingness to cooperate;
- The existence and effectiveness of the company's pre-existing compliance procedures;
- Any remedial actions;
- The collateral consequences of a prosecution – for example, employees being made redundant;
- The adequacy of prosecuting individuals for the corporation's malfeasance;
- The adequacy of civil or regulatory remedies.

The SEC's approach considers similar, but not identical factors. These include whether the case concerns a widespread industry practice, and whether the case provides an opportunity for the SEC to be visible in a community which might not otherwise be familiar with it.

Both organisations place great reliance on self-reporting. Even if this does not prevent a prosecution, it can facilitate a plea bargain. In addition, the guide emphasises the importance of a proper corporate compliance procedure. The adequacy of such a procedure is a significant factor in the DOJ and SEC deciding whether to prosecute a corporation. Such a compliance regime should include:

- A top-down ethical culture supporting compliance;
- A clear, concise and accessible code of conduct;
- Proper internal controls, auditing practices, documentation policies and disciplinary procedures;
- Appropriate resources and authority for those in charge of oversight;
- A proportionate risk assessment;
- Training and access to continuing advice for employees;
- Proper incentives for compliant behaviour and disciplinary action for violations;
- Due diligence prior to using third parties;
- Confidential reporting and internal investigation procedures;
- Periodic testing and reviewing of those compliance procedures.

The United States has far greater flexibility in the enforcement and prosecution of bribery offences than the United Kingdom. The advantages of self-reporting, remediation and full cooperation are significant. The guidance emphasises this pragmatic approach, and the range of options the DOJ and SEC have at their disposal.