

INSIGHT.

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Latest Developments in U.S. FCPA Enforcement

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Enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA) remains a high priority for the U.S. Government. The U.S. Department of Justice (DOJ) is responsible for criminal enforcement and the Securities and Exchange Commission (SEC) handles civil enforcement under the FCPA. Most U.S. companies and multi-nationals are all too familiar with the staggering costs of investigating and resolving these matters. Below we summarize the recent developments and priorities for FCPA enforcement and offer guidance regarding complying with the FCPA.

■ Focus on China

While the U.S. is aggressively enforcing the FCPA around the globe, much attention remains focused on Asia and China specifically. There are approximately 25 current open investigations of possible FCPA violations related to activity in China. This number does not include investigations that have not been publicly reported, involving private companies and/or new investigations. There have also been a number of recent resolutions with the U.S. government related to activities in China. For example, on July 11, 2016, a U.S. technology multinational agreed to pay US\$14 million to the SEC to settle FCPA allegations related to its Chinese subsidiary. Similarly, on March 23, 2016, a large pharmaceutical company agreed to pay the SEC \$25 million to settle alleged FCPA violations involving its use of third parties in China. In the last five months, seven com-

panies have paid \$88 million to the U.S. government to resolve FCPA allegations related to activities in China.

■ Focus on individuals

The DOJ has recently emphasized individual accountability (as opposed to solely corporate accountability) for FCPA violations. On September 9, 2015, the DOJ issued a new policy (referred to as the "Yates Memo") on individual accountability, including under the FCPA. The policy provides, in part, that: (1) to receive cooperation credit, a company must turn over all relevant information on the wrongdoing of individuals; (2) all DOJ investigations will focus on individual wrongdoing from the onset; (3) individuals will not be released from civil or criminal liability absent extraordinary circumstances; (4) corporate actions should not be settled without a clear plan to resolve individual cases; and (5) civil attorneys should evaluate whether to bring a suit against an individual based on consideration beyond the individual's ability to pay. This focus on individual accountability will have a significant impact on the resolution of future FCPA allegations and investigations.

■ Establishment of Pilot Program

On April 5, 2016, the DOJ announced a new FCPA enforcement Pilot Program. The DOJ stated that the Pilot Program is intended to deter FCPA violations, encourage implementation of anti-corruption com-

pliance programs and increase prosecution for individuals whose conduct may have gone undiscovered. Under the Pilot Program, a company can receive up to a 50 percent reduction off the bottom of the U.S. Sentencing Guidelines fine range if the company voluntarily discloses misconduct, fully cooperates and takes timely and appropriate steps to remediate the issues discovered. In one recent matter, while the company agreed to pay the SEC US\$14 million in civil penalties, under the Pilot Program, the DOJ declined to pursue criminal charges. Similarly, under the Pilot Program, in June 2016, the DOJ also closed inquiries regarding two other companies for alleged misconduct by their Chinese subsidiaries (though one paid approximately \$322,000 and the other paid \$672,000 to resolve matters with the SEC).

■ Increased government resources and collaboration

The U.S. government is also committing more resources to investigating and pursuing potential FCPA violations. The DOJ's Fraud Section has increased its FCPA unit by more than 50 percent by adding ten federal prosecutors. The FBI has established three squads of special agents devoted to FCPA and related investigations. In addition, the DOJ has noted that approximately ten FBI agents are currently stationed outside of the United States investigating FCPA and related crimes. The SEC's Enforcement



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Division has also instituted a specialized unit committed to FCPA enforcement.

In addition, the DOJ has been strengthening cooperation with foreign governments. In September 2015, after President Xi visited with President Obama, the Chinese Foreign Ministry announced that China and the U.S. "agree to enhance practical cooperation in corruption prevention . . . and combatting transnational bribery." As part of the Pilot Program, the DOJ noted that it is "strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable."

■ What to do?

As news reports reflect almost daily, Chinese authorities are also prioritizing combating corruption. Given the DOJ's and SEC's con-

tinuing focus on FCPA misconduct, specifically in China, and the increased focus of Chinese authorities, companies must take action to ensure compliance. It is imperative that all U.S. and multinational companies have in place compliance programs to prevent and detect potential FCPA violations. While the breadth and scope of a compliance program is unique to each company's risk profile, in general, companies should: (1) institute or update compliance and anti-corruption policies; (2) emphasize the importance of compliance and empower compliance professionals within the company; (3) routinely analyze risk and perform FCPA and anti-corruption risk assessments; (4) train all at-risk employees (including senior management and boards) and third parties (including, for ex-

ample, agents, representatives, joint-ventures, licensees and vendors); (5) monitor employees and third-parties; and (6) conduct FCPA due diligence before transacting with third-parties or purchasing or partnering with another company. In this climate of aggressive enforcement, it is critical to implement effective and efficient risk-based anti-corruption policies, procedures and programs and to diligently monitor compliance. ■



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