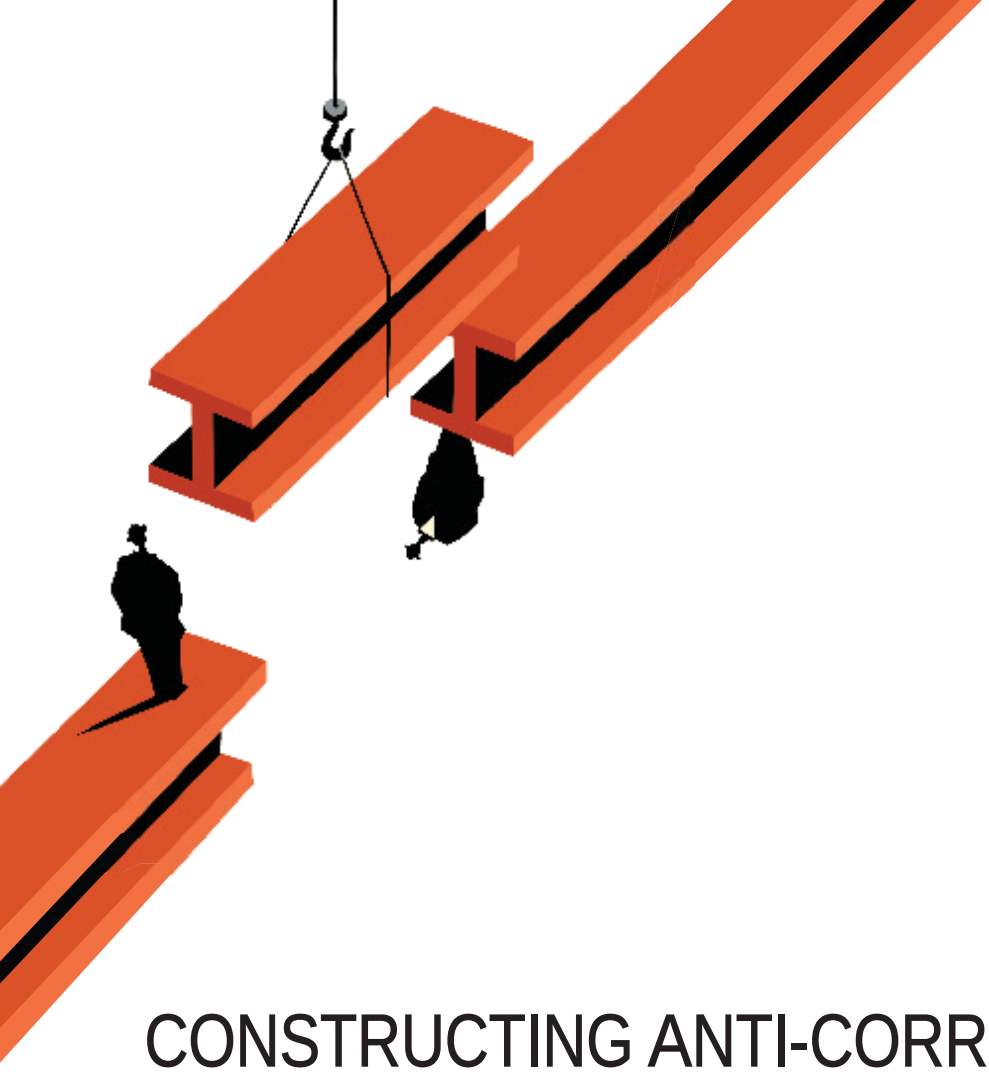

CONSTRUCTING ANTI-CORRUPTION COMPLIANCE

A Research Perspective Issued by the

Navigant Construction Forum™

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Building on the lessons learned in construction dispute avoidance and resolution.™

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Purpose of Research Perspective

Over the past few decades the construction industry has morphed from local or regional contractors to national or even global contractors. Many U.S. contractors are now bidding and performing work internationally. Contractors that grew from local to regional firms are then to national firms learned, sometimes painfully, how to compete in this larger arena. For those construction firms that jumped into the international marketplace such a transition led to yet another learning experience – bidding in foreign markets; teaming with local contractors, suppliers and materialmen; arranging for local labor; sending trusted employees overseas often for the first time and/or employing foreign expatriates; learning about foreign laws, regulations, customs and building codes; and competing against local and/or other international contractors.

Additionally, U.S. contractors working abroad find themselves faced with some U.S. laws that follow them overseas. Among these U.S. laws is the Foreign Corrupt Practices Act enacted in 1977 which includes a number of legal prohibitions and some large penalties should a U.S. contractor be found guilty of violating this statute. Additionally, there are similar statutes in other countries that U.S. contractors working abroad must comply with.

The purpose of this research perspective is to provide contractors working abroad with information on the Foreign Corrupt Practices Act, as well as three other similar national laws. Additionally, this research perspective offers a number of pointers on how contractors can mitigate their risk with regard to this U.S. law.

Introduction

In a scene from the movie *Syriana*, an attorney for Killen, a fictional U.S. energy company, has discovered a wire transfer indicating that the company may have bribed government officials in Kazakhstan to secure petroleum drilling rights. While company executives feign ignorance of any corrupt activities, the attorney notes that the U.S. Department of Justice ("DOJ") will likely want "a body" to charge with corruption. The executive who is ultimately charged doesn't argue that a bribe wasn't paid, but rather asserts the necessity of the bribe – contending that everyone engages in this type of behavior, stating:

> "Some trust fund prosecutor, got off-message at Yale thinks he's gonna run this up the flagpole? Make a name for himself? Maybe get elected some two-bit congressman from nowhere, with the result that Russia or China can suddenly start having, at our expense, all the advantages we enjoy here? No, I tell you. No, sir! Corruption charges! Corruption? Corruption is government intrusion into market efficiencies in the form of regulations. That's Milton Friedman. He got a goddamn Nobel Prize. We have laws against it precisely so we can get away with it. Corruption is our protection. Corruption keeps us safe and warm. Corruption is why you and I are prancing around in here instead of fighting over scraps of meat out in the streets. Corruption is why we win." (*Danny Dalton in a scene from Syriana, Warner Brothers Productions – 2005*).

While the movie is fictional, as many of the world's largest and well known multinational companies and their employees have discovered, this type of conduct is not. And unfortunately, the ramifications and consequences of the conduct are likewise not fictional – in these situations life truly imitates art. In 2014, the U.S. government meted out approximately $1.6 billion in monetary penalties for violations of the U.S. Foreign Corrupt Practices Act ("FCPA"), an amount that was almost double the amount assessed in 2013. In addition, 12 corporate executives entered guilty pleas and/or were arrested or indicted for violations of the FCPA.

Corruption in the Construction and Engineering Industry

Enforcement of the FCPA knows no bounds as far as industries are concerned, with cases being brought against oil and gas companies, financial institutions, pharmaceutical and medical device companies, telecommunications, defense and consumer products companies, and as discussed immediately below, construction and engineering companies. Subsequent sections of this article will provide an overview of the FCPA and its international counterparts[2] and then perhaps most importantly, will provide guidance on how these risks and the resultant consequences can be mitigated. More specifically, the article will provide guidance on the specific steps that multinational companies should

[1] This information was obtained based on a review of U.S. Department of Justice and U.S. Securities and Exchange Commission enforcement actions.

[2] The FCPA and its international counterparts generally apply to bribery of *foreign* government officials. For example, the FCPA applies only in situations involving U.S. entities and individuals and government officials in another country. The FCPA does not apply to situations involving U.S. entities and individuals and *domestic* (i.e., U.S.) government officials, nor does it apply to cases of commercial or private bribery, though such conduct however would in all likelihood be illegal under other statutes that prohibit domestic bribery.

follow in developing, documenting and implementing a robust anti-corruption compliance program that satisfies regulatory guidance and expectations.

Bonny Island Venture Cases – 2009-2011

Facts

The Bonny Island Venture cases related to a joint venture amongst several companies to build liquefied natural gas facilities on Bonny Island, Nigeria. The joint venture, known as TSKJ included: Kellogg, Brown and Root ("KBR"), a global engineering firm; Technip, an engineering and construction firm; Snamprogetti, an engineering and construction firm; and JGC, a construction firm.

Sanctions

All four companies involved in the TSJK venture settled with the government for civil and criminal penalties in the following amounts:

- KBR - $579 million;[3]
- Snamprogetti - $365 million;[4]
- Technip - $338 million[5]; and
- JGC - $219 million.[6]

Currently, KBR, Snamprogetti, Technip and JGC are respectively, the third, seventh, eighth and ninth largest FCPA settlements in history. Additionally, Jack Staley, KBR's former CEO and Jeffrey Tesler, a consultant for the TSKJ joint venture received prison sentences of 30 and 21 months respectively for their participation in the conspiracy[7]. Furthermore, Staley was also ordered to pay $10.8 million in restitution to KBR and Tesler was ordered to pay a $25,000 fine and forfeit $148,964,568. How corruption can destroy someone's life was illustrated during Tesler's sentencing hearing where he stated:

> "I allowed myself to accept standards of behavior in a business culture which can never be justified. I accepted the system of corruption that existed in Nigeria. I turned a blind eye to what was happening and I am guilty of the offenses charged. In hindsight, I should have withdrawn immediately from the actions which I undertook and rejected the terms that were offered to me by the TSKJ joint venture to facilitate bribes to high-ranking Nigerian officials, although it would not have been easy to extricate myself without risking the lives of myself and my family. I have had a lot of time to reflect and there is no day when I do not regret my weakness of character and being caught up in a violent military culture with customs that are harmful to the social fabric and breach of laws. I wish to say that I am truly sorry and I wish to apologize to the Court and, most importantly, I have to apologize for the grief and unwarranted suffering I have caused my wife, children and grandchildren and my wife's circle of friends who have expressed their support in writing directly to Your Honor on my behalf. I ask the Court to consider that I have already suffered a punishment for my actions. I have lived for the last ten years

[3] Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine - Enforcement Actions by DOJ and SEC Result in Penalties of $579 Million for KBR's Participation in a Scheme to Bribe Nigerian Government Officials to Obtain Contracts, Department of Justice Press Release (February 11, 2009). Available at http://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million.

[4] Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty - $1.28 Billion in Total Penalties Obtained to Date for Scheme to Bribe Nigerian Government Officials to Obtain Contracts, Department of Justice Press Release (July 7, 2010). Available at http://www.justice.gov/opa/pr/snamprogetti-netherlands-bv-resolves-foreign-corrupt-practices-act-investigation-and-agrees.

[5] Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty, Department of Justice Press Release (June 28, 2010). Available at http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million. [6] JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty - $1.5 Billion in Total Penalties Obtained to Date for Scheme to Bribe Nigerian Government Officials to Obtain Contracts, Department of Justice Press Release (April 6, 2011). Available at http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188

[7] Former Chairman and CEO of Kellogg, Brown & Root, Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes - U.K. Solicitor and Former Salesman Also Sentenced for Participation in Scheme to Bribe Nigerian Government Officials, Department of Justice Press Release (February 23, 2012). Available at http://www.justice.gov/opa/pr/former-chairman-and-ceo-kellogg-brown-root-inc-sentenced-30-months-prison-foreign-bribery-and.

under investigation. I have irreparably lost my good name, position in society, professional livelihood and I will be disbarred. During the past twelve months I have been living under virtual house arrest, cut off from my wife, my daughters and grandchildren, one of whom has been having, and continues to have, treatment for life-threatening cancer."[8]

Layne Christensen Company – October 28, 2014[9]

Facts

Layne Christensen Company ("Layne") is a global water management, construction and drilling company with more than 100 offices in Africa, Australia, Europe, South America, and North America. During the period of 2005 to 2010, Layne paid approximately $1 million in bribes to government officials in Mali, Guinea, the Democratic Republic of the Congo, Burkina Faso and Tanzania and received approximately $3.9 million in benefits as a result of the payment of approximately $1 million in bribes. The benefits included:

- Reduction of tax liabilities and avoidance of penalties for delinquent payment of tax-related penalties in the amount of approximately $3.2 million;
- Avoidance of customs duties;
- Obtaining clearance to import and export equipment;
- Obtaining boarder entry and work permits for employees; and
- Avoidance of penalties for non-compliance with immigration and labor regulations.

The bribes were falsely recorded as legal fees and commissions in the company's books and Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty, Department of Justice Press Release (June 28, 2010). Available at http://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million records.

Sanctions

Layne settled with the SEC, agreeing to disgorge approximately $4.8 million and pay a civil penalty in the amount of $375,000.

The PBSJ Corporation - January 22, 2015[10]

Facts

The PBSJ Corporation ("PBSJ") was a company that provided engineering, architectural and planning services primarily in the Middle East. Walid Hatoum ("Hatoum") was the Director of International Marketing.

In 2009, while PBSJ was in the midst of an RFP process with the Qatari government, Hatoum offered and authorized the payment of approximately $1.4 million of bribes to a Qatari government official. In exchange the government official provided PBSJ with access to confidential sealed-bid and pricing information that resulted in PBSJ winning the bids to construct a hotel resort development project in Morocco and a light rail transit project in Qatar. Additionally, after the bribery scheme was discovered and the contract with PBSJ terminated by the Qatari government, Hatoum offered a second government official employment with PBSJ in return for that official's help in trying to get the contract with the Qatari government reinstated. The bribes were recorded as "agency fees" on PBSJ's books and records to conceal their true nature, though they were never actually paid.

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[8] Jeffrey Tesler: I have nothing to live for except to seek forgiveness, FCPA Blog (September 11, 2012). Available at http://www.fcpablog.com/blog/2012/9/11/jeffrey-tesler-i-have-nothing-to-live-for-except-to-seek-for.html#sthash.

[9] In the Matter of Layne Christensen Company, Securities and Exchange Act of 1934, Release No. 73437 (October 27, 2014).

[10] PBSJ Deferred Prosecution Agreement, January 22, 2015; and In the Matter of Walid Hatoum, Securities and Exchange Act of 1934, Release No. 34-74112 (January 22, 2015).

Sanctions

PBSJ entered into a deferred prosecution agreement with the U.S. Securities and Exchange Commission ("SEC") where they agreed to, among other things, enhance their anti-bribery and corruption compliance program; disgorge the $2.8 million of profit they earned as a result of their illegal conduct; and pay a civil penalty of $375,000. Hatoum agreed to the entry of a cease and desist order and agreed to pay a civil penalty of $50,000.

The Foreign Corrupt Practices Act

Regulatory Background

In the early 1970's as Congress investigated the Watergate political scandal, the SEC discovered that a number of companies had created "slush funds" to make illegal campaign contributions in the U.S. and corrupt payments to foreign government officials and then falsified their corporate books and records to conceal or misrepresent these payments. In fact, the SEC found that more than 400 corporations, 117 of which were ranked in the Fortune 500, had paid out more than $300 million to foreign government officials, politicians and political parties to secure favorable treatment by foreign governments[11]. Congress deemed these payments as unethical and "counter to the moral expectations and values of the American public"[12] and noted that such payments, "erode[d] public confidence in the integrity of the free market system".[13]

Counter to Danny Dalton's belief that corruption is warranted and beneficial, corruption was then, and is still, a global problem. Studies have indicated that corruption brings both financial and non-financial costs to world economies, governmentssand the overall health of its citizens. These costs include, but are not limited to (i) the diverting of public resources from health, education and infrastructure needs; (ii) the weakening of the rule of law; (iii) the facilitation of criminal activity such as human and arms trafficking and the drug trade; (iv) the impeding of efforts to promote freedom, democracy, and the elimination of poverty.[14]

In response to the findings and concerns expressed by Congress during the Watergate hearings, the FCPA was enacted in 1977.[15] The purpose of the FCPA as stated in the preamble to the statute, is to "...make it unlawful…to make certain payments to foreign officials and other foreign persons and to require…issuers to maintain accurate records."[16] As discussed more fully below, criminal and civil liability can be imposed on individuals and entities that violate the anti-bribery and accounting provisions of the FCPA.

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[11] House of Representatives Report No. 95-640, Unlawful Corporate Payments Act of 1977, (September 28, 1977). (Hereinafter H.R. Report 95-640). H.R. Report 95-640 incorporated information from the U.S. Securities and Exchange Commission Report on Questionable and Illegal Corporate Payments and Practices, (1976).

[12] See H.R. Report 95-640 at pg. 4.

[13] See, H.R. Report 95-640 at pg. 4.

[14] A Resource Guide to the U.S. Foreign Corrupt Practices Act By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, (November 14, 2012). (Hereinafter "FCPA Resource Guide").

[15] The FCPA was signed into law on December 19, 1977 and is codified in 15 U.S.C. §§ 78dd-1, et seq.

[16] See, preamble to FCPA.

Anti-Bribery Provisions[17]

In sum, and more simply stated, the anti-bribery provisions of the FCPA make it illegal to offer, authorize, promise or pay a bribe to a foreign official to obtain or retain business.

Prohibited Conduct

The anti-bribery provisions of the FCPA prohibits:

a. An offer to pay, a promise to pay, the authorization of a payment or the payment;
b. Of money or any item of value;[18]
c. To:
    i. any foreign official,[19] foreign political party or party official or any candidate for foreign political office, in order to influence any act or decision of that official;
    ii. any person, while knowing that all or a portion of that money or item of value will be offered, given, promised directly or indirectly to a foreign official;[20]
d. To induce that foreign official to use their position in order that the company can secure another improper advantage to obtain or retain business.[21]

Who is Covered?

The anti-bribery provisions of the FCPA apply to:

a. Issuers (i.e., public companies);
b. Domestic concerns (i.e., (i) U.S. citizens, nationals or residents; (ii) U.S. or state organized entities or entities that conduct business in the U.S.; (iii) anyone acting on behalf of a domestic concern);
c. Foreign persons or entities that directly or indirectly[22] act to further a corrupt payment while in U.S. territory.[23]

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[17] 15 U.S.C §78dd.

[18] The phrase "item of value" is not defined in the FCPA leaving its interpretation to the courts, DOJ and the SEC, all of whom have interpreted the phrase very broadly in recognition of the fact that bribes can come in many different forms and sizes. The FCPA Resource Guide cites items of value as including, but not being limited to, cash, gifts, travel and entertainment, charitable contributions. In addition, loans, promises of employment and internships have also been deemed "items of value". While none of these items are per se impermissible, they must be reasonable under the circumstances and not be intended as a "quid pro quo" for obtaining or retaining business.

[19] The FCPA defines a "foreign official" as any officer or employee of (i) a foreign government, department, agency or instrumentality thereof; (ii) a public international organization (i.e., United Nations, World Bank); or (iii) any person acting in an official capacity for or on behalf of the foreign government, department, agency, instrumentality or public international organization. See, 15 U.S.C. §78dd- 1(f)(1)(A)(B); §78dd-2(h)(2)(A)(B); §78dd-3(f)(2). Like the term "item of value", who is considered a "foreign official" for purposes of the FCPA is also interpreted quite broadly. The use of the word "any" when referencing a foreign official indicates that payments to both low ranking and high ranking officials are covered. In addition, the term "instrumentality" when referring to a government, department or agency has been interpreted broadly. A recent case from the 11th Circuit Court of Appeals, United States v. Esquenazi, No. 11-15331, 11th Cir. (May 16, 2014), holds that whether an entity is an instrumentality of a government, department or agency is fact specific – and considers the entity's ownership, control, status and function. To this end, telecommunications, defense, utilities, and hospitals (just to name a few), if government owned, controlled or funded, could be considered instrumentalities, thus making their employees foreign government officials.

[20] Many multinational companies conducting business or seeking to conduct business in foreign countries, retain third parties such as agents, consultants, and vendors to assist them in conducting, obtaining or retaining business. For example, companies may hire a third party to help them obtain visas for their employees or customs-related permits to bring equipment into a foreign country. Companies may also employ the services of consultants that are well versed in the country's language, customs, local laws, and/or government contracting process. Pursuant 15 U.S.C. §78dd-1(a)(3); §78dd-2(a)(3); §78dd-3(a)(3), the fact that a bribe may have been paid by a third party does not eliminate liability under the FCPA. As discussed below in Section V, the potential risks of dealing with third parties can be mitigated by conducting adequate due diligence on the third party.

[21] From a practical standpoint this means that there must be connection between the bribe and the company's business – the "business purpose test". Like other parts of the FCPA, the business purpose test has been interpreted broadly. In United States v. Kay, No. 02-20588, (5th Cir. 2004), the Fifth Circuit Court of Appeals ruled that bribes paid to obtain favorable tax treatment satisfied the business purpose test. Specifically, the Court stated:

"Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements" and, "….the congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether it be related to administering the law, awarding, extending or renewing a contract, or executing or preserving an agreement."

The FCPA Resource Guide provides the following examples of actions taken to obtain or retain business – (a) winning a contract; (b) influencing the procurement process; (c) circumventing the rules for importation of products; (d) gaining access to non-public bid tender information; (e) evading taxes or penalties; (f) influencing the adjudication of lawsuits or enforcement actions; (g) obtaining exceptions to regulations; and avoiding contract termination.

[22] See note 21.

[23] In other words, individuals or entities that do not qualify as domestic concerns or issuers can be prosecuted for violating the FCPA if the conduct occurs in U.S. territory. For example, in United States v. Alcatel-Lucent France, S.A., No. 10-CR-20906 (S.D. Fla. December 27, 2010), DOJ relied on U.S. based meetings, e-mails and telephone calls with individuals in the U.S. to secure jurisdiction. In addition, a number of the bribes were paid to and/or through U.S. bank accounts or were routed through the U.S. banking system.

Defenses

The anti-bribery provisions include two affirmative defenses. First, a defendant can assert the "local law defense" and show that the payment was lawful under the written **(emphasis added)** laws of the foreign country.[24] Second, the defendant can claim the "promotional expenditure defense" and argue that the payment was made as part of a plan to demonstrate a product or service.[25]

Accounting Provisions

Requirements

The accounting provisions of the FCPA require issuers to:

a. Make and retain accurate books and records[26] ; and

b. Devise and maintain a system of internal accounting controls that reasonably assures control, authority and responsibility over a firm's assets.[27]

Who is Covered?

The accounting provisions of the FCPA apply only to issuers (i.e., public companies). The overall purpose of the FCPA's accounting provisions is to "strengthen the accuracy of the corporate books and records and the reliability of the audit process, which constitute the foundations of our system of corporate disclosure."[28]

Facilitation Payments

Unlike many of its international counterparts (which are discussed later in Section IV below), the FCPA allows small payments to foreign officials to "… expedite or…secure the performance of a routine governmental action."[29] A routine governmental action is in turn defined as an action which is ordinarily and commonly performed by a foreign official and includes processing of visas, providing police protection or mail service and supplying utilities. According to the FCPA Resource Guide, routine governmental action does not include decisions to award new business nor continue existing business. Routine governmental action also does not include acts that fall within an official's discretion or would constitute a misuse of their office. The FCPA Resource Guide provides an excellent example of the exception noting that paying an official to have the power turned on might well be considered a facilitating payment, but paying an official to ignore the fact that the company does not have a valid permit to operate the factory would not.[30]

Penalties and Effects of Non-Compliance

Individuals and entities that violate the FCPA can be prosecuted criminally and/or civilly. Only the DOJ can bring criminal charges for violations of both the anti-bribery and accounting provisions that include prison sentences, criminal fines for individuals and criminal fines against entities. On the civil side, both DOJ and the

[24] See, 15 U.S.C. §78dd-1(c)(1); §78dd-2(c)(1); §78dd-3(c)(1).

[25] See, 15 U.S.C. §78dd-1(c)(2); §78dd-2(c)(2); §78dd-3(c)(2).

[26] 15 U.S.C §78m(b)(2)(A).

[27] 15 U.S.C §78m(b)(2)(B).

[28] Senate Report 95-114, Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977, Report of the Committee on Banking, Housing and Urban Affairs – United States Senate, (hereinafter S.Rep. 95-114).

[29] See, 15 U.S.C. §78dd-1(b); §78dd-2(b); §78dd-3(b).

[30] See, FCPA Resource Guide at 25.

SEC can bring charges, which may include financial penalties and injunctive actions.

Additionally, there are a number of statutory and regulatory collateral consequences that may result, including:

d. Debarment from government contracting or from contracting with organizations such as the World Bank;

e. Loss of export privileges; and

f. Imposition of a compliance monitor.

Furthermore, a finding or determination that a company and/or its employees have violated the FCPA can lead to other non-statutory and regulatory collateral consequences. A recent Compliance Week article noted that the costs associated with Walmart's ongoing investigations now exceed $600 million – with $173 million spent in 2015; $282 million spent in 2014 and $157 million spent in 2013.[31] During Walmart's second quarter conference call, management noted that FCPA and compliance related costs for the quarter were approximately $30 million which included approximately $23 million for the ongoing government inquiries and investigations and approximately $7 million for enhancement of its global compliance program and organizational enhancements.[32] This may result in:

1. Adverse effect on a company's stock price;
2. Legal and related investigative costs, including the costs associated with the retaining of a compliance monitor;
3. Disruption of a company's business due to the use of resources to respond to government requests for information and internal investigation needs;
4. Class action civil litigation and related financial costs; and
5. Reputational damage.

INTERNATIONAL COUNTERPARTS TO THE FCPA

Corruption is an international problem and requires international efforts to address those problems. Set forth below is a comparison of the FCPA to three of the more well-known other international anti-bribery and corruption regulations – the U.K. Bribery Act ("UKBA")[33] ; the Canada Corruption of Foreign Public Officials Act ("CFPOA")[34] ; and the Brazil Clean Companies Act ("BCCA"). [35]

[31] Walmart FCPA Costs Reach $675 Million, *Compliance Week* (August 19, 2015). Available at https://www.complianceweek.com/blogs/enforcement-action/walmart-fcpa-costs-reach-675-million#.VdyPZU3bLGg.

[32] WAL-MART STORES, INC. (NYSE: WMT) Second Quarter Fiscal Year 2016 Earnings Call August 18, 2015, Management call as recorded. Available at http://stock.walmart.com/files/doc_financials/2016/Q2/Management-earnings-call-transcript.pdf?_ga=1.95075356.1291246605.1440517989.

[33] The Bribery Act of 2010, Chapter 23. Royal Assent Provided on April 8, 2010.

[34] The Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (February 14, 1999).

[35] Brazil Clean Companies Act, Federal Law 12,846/2013.

PROVISIONS[36]	FCPA	UKBA	CFPOA	BCCA
Anti-Bribery Provisions	Applies only to bribery of foreign officials. (See 15 U.S.C. §§78dd-1(a)-3(a)).	Applies to both commercial bribery and bribery of foreign political officials. (See Sections 1, 2 and 6).	Applies only to bribery of foreign officials. (See Section 3.(1))	Applies to bribery of both Brazilian public officials and foreign public officials (See Chapter I Article 1).
Bribe Recipients	Does not apply to the receipt of a bribe.[37]	Covers only bribe recipients with respect to commercial bribery. (See Sections 1 and 2).	Does not apply to the receipt of a bribe.	Does not apply to the recipient of a bribe.
Accounting Provisions	Contains accounting provisions. (See 15 U.S.C. § 78m).	Does not contain accounting provisions.	Contains accounting provisions. (See Section 4.(1)	Does not contain accounting provisions.
Affirmative Defense and Mitigation – Compliance Program	The Principles of Federal Prosecution of Business Organizations (See Chapter 9-28.000) and the U.S. Sentencing Guidelines (See Chapter 8) as well as the SEC's Cooperation Guidelines contain the framework for mitigation of charges and sanctions based on the effectiveness of an organization's compliance program and the voluntary disclosure and cooperation by companies and individuals.	The UKBA permits companies that have allegedly failed to prevent bribery to assert an affirmative defense that they had "adequate procedures" in place to prevent the bribe.[38] (See Section 7(2)).	While not specifically included in the CFPOA, it appears that the Canadian government will consider the effectiveness of an organization's compliance program and its remedial efforts, including voluntary disclosure of potentially violative conduct. (See Griffiths Energy International, January 14, 2013).	The BCCA provides a leniency program for companies that first disclose wrongdoing and cease involvement in the unlawful practice. It additionally includes a provision to encourage the cooperation of the legal entity with the investigation of the violations, including by voluntary reporting them to the authorities, as well as the disclosure of information during the course of the investigations (see Chapter V Article 16). In addition, "the existence of _ mechanisms and internal integrity procedures, audit and incentive denunciation of irregularities in applying the code of conduct and ethics within the legal entity" will be taken into consideration when applying sanctions (see Chapter III Article 7).
Affirmative Defense – Local Law	Provides an affirmative defense for payments that are permissible under written local law. (See 15 U.S.C. §78dd-1(c)(1), 15 U.S.C. §78dd-2(c)(1); See 15 U.S.C. §78dd-3(c)(1)).	Provides a local law defense only with respect to payments made to foreign political officials. (See Sections 6(3) and 6(7)). On the other hand, with respect to "commercial bribery," written local law can be considered only as a mitigating factor in determining what a reasonable payor or payee in the U.K. would expect in return for the payment. (See Section 5(2)).	States that no person shall be deemed to have committed an offense if a payment is permitted or required under a foreign law or the law relating to the organization for which the foreign official works. (See Section 3.(3)(a)).	Does not provide an affirmative defense for local law.

[36] This table does not purport to address every aspect of the FCPA, UKBA, CFPOA or BCCA.

[37] The U.S. government however can prosecute bribe recipients pursuant to other authority including the Travel Act (18 U.S.C. §1952) and Money Laundering regulations (18 U.S.C. §1956, 1957). Additionally, the government is seeking to recover the proceeds of bribery and corruption through its Kleptocracy Initiative and Asset Forfeiture (18 U.S.C. §981, 982).

[38] On September 22, 2010, the U.K. Ministry of Justice, as required by Section 9 of the UKBA published guidance regarding the nature and scope of the adequate procedures defense.

PROVISIONS[37]	FCPA	UKBA	CFPOA	BCCA
Affirmative Defense – Promotional Expenditures	Provides an affirmative defense for payments that are reasonable and bona fide business expenses that are directly related to the promotion, demonstration or explanation of products or services, or the execution or performance of a contract with a foreign government or agency. (See 15 U.S.C. §78dd-1(c)(2); 15 U.S.C. §78dd-2(c)(2); 15 U.S.C. §78dd-3(c)(2)).	Does not provide an affirmative defense for bona fide business expenses.	States that no person shall be deemed to have committed an offense if a payment for the reasonable expenses incurred by a foreign official that are directly related to the promotion, demonstration or explanation of products or services, or the execution or performance of a contract with a foreign government or agency. (See Section 3.(3)(b)).	Does not provide an affirmative defense for bona fide business expenses.
Facilitation Payments	Permits facilitation payments. (See 15 U.S.C. §78dd-1(b); 15 U.S.C. §78dd-2(b); 15 U.S.C. §78dd-3(b)).	Does not permit an exception for facilitation payments.	Facilitation payments will be phased out at a date to be determined by the Federal Cabinet.	No exception for facilitating payments.[39]

[39] Further, facilitation payments are prohibited under Brazilian law. Such actions can subject companies to civil and administrative liability and can subject individuals to fines and up to twelve years imprisonment. *See Brazilian Penal Code (Art.337-B and 337-C).*

Mitigating the Risk

Constructing a building, road, tunnel or bridge that won't break down or collapse, bringing with it potential criminal, civil or regulatory liability and/or damage to the reputation of the individuals and/or entities involved in the project is a process – a process that requires a number of different steps. Amongst these steps are the identification of a project manager to oversee the work; careful scoping and planning of the project to understand potential risks; creation of the design; development and documentation of plans, schedules and financial budgets; and perhaps most importantly, cooperation, communication and collaboration amongst various stakeholders (owners, architects, engineers, developers, builders and their subcontractors, suppliers and materialmen).

Mitigating potential bribery and corruption risks is also a process – a process that rests upon the development, documentation and implementation of a robust and comprehensive corporate anti-bribery and corruption compliance program. Set forth below are the recommended steps that a company should take in developing an anti-bribery and corruption compliance program. The italicized parenthetical language are the analogous steps of the construction process.

Establishing an Effective Tone at the Top *(Cooperation, Communication and Collaboration)*

A corporate compliance program can only be effective if there is "buy-in" by an organization's employees to the importance of compliance. In turn, buy-in by employees can only occur if they see the organization's leadership (i.e., senior management and the board of directors) demonstrating that compliance is a high priority. Senior management and the board of directors can demonstrate an effective tone at the top by among other things:

1. Including a written message in the introduction to corporate compliance policies and procedures stating that compliance is vitally important to the organization, should be taken seriously and that illegal or unethical behavior will not be tolerated;
2. Not only attending and participating in compliance training, but more importantly during such training, endorsing both (a) how important training is to promoting an effective compliance culture; and (b) the importance of compliance itself; and
3. Taking ownership of the importance of compliance by keeping abreast of regulatory developments and expectations.

In addition to tone at the top, it's also important that there be an effective "tone in the middle" – in other words, has the tone at the top trickled down to middle management and the organization's employees? In many ways, an organization's tone in the middle is a true bellwether of an organization's commitment to compliance.

According to DOJ and the SEC, "A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure."[40]

Clearly Articulated Anti-Bribery and Corruption Policy *(Cooperation, Communication and Collaboration)*

The expectation that organizations develop, document and implement a clearly articulated anti-bribery and corruption policy can almost be considered part and parcel to establishing an effective tone at the top as management and the board will use that policy to demonstrate the organization's

[40] FCPA Resource Guide at 57.

commitment to compliance. As a preliminary matter, it is imperative that the organization's anti-bribery and corruption policy be documented. A robust policy should unambiguously address the following matters:

1. Contain an affirmative statement that the organization will not tolerate bribery and corruption in any form;
2. Contain an affirmative statement that anti-bribery and corruption compliance is a serious matter and is of paramount importance to protecting the organization and its people from potential legal and regulatory liability and protecting their reputations;
3. Clearly identify who is required to comply with the compliance program;
4. Set forth the general standards that the organization is required to comply with;
5. Identify the potential consequences for failure to comply with the organization's policies and procedures and relevant laws and/or regulations; and
6. Provide employees with resources to disclose possible violations of the organization's policies and procedures and/or relevant laws and regulations.

Once documented, the policy should be approved at the highest levels of the organization and then communicated throughout the organization.

Providing Adequate and Qualified Resources *(Project Manager)*

An organization's compliance program can be effective only if it is properly and adequately implemented. In other words, an effective compliance program needs to be more than words on a page. One way to ensure proper implementation is by devoting adequate levels of qualified to the program's operation and oversight. From a practical standpoint, this means the following:

1. Oversight of the compliance program should be assigned to professionals at a senior level;
2. Individuals responsible for the program should have relevant subject matter expertise and experience;
3. Individuals responsible for the program must have independence and autonomy from senior management to operate the program. This means that they should have direct access to the board of directors (usually the audit committee of the board).
4. The interests of compliance should not be compromised by revenue interests of the business. This means that compliance should be empowered with sufficient authority and autonomy to enforce the compliance program and to take any appropriate actions to address and mitigate any risks that may arise from an organization's business.
5. Adequate financial resources should be devoted to compliance so that the compliance program has a sufficient level of resources in terms of both of personnel and technology.

There is no magic number or formula to determining the adequate level of compliance resources – it will instead depend on the nature and scope of its business and the related risks it faces.

Development of a Risk Assessment (*Scoping and Planning the Project*)

Effective compliance is not one size fits all. This means that for an organization's compliance program to satisfy regulatory expectations it must be tailored to the nature and scope of its business. To adequately and effectively tailor and customize a compliance program, the organization must first assess the potential bribery and corruption risks associated with items including:

1. The business it engages in (i.e., does the organization operate in what can be considered a high risk industry; does the organization have interaction with foreign governments; etc.);
2. The geographies in which it operates (i.e., does the organization operate in jurisdictions that are considered high risk for bribery and corruption);
3. The operational and compliance structure of the organization (i.e., is this a complex organization with numerous affiliates and subsidiaries; is the compliance organization centralized or decentralized; likewise is the accounting and financial reporting structure centralized or decentralized)
4. The process for distributing its products and services (i.e., does the organization make use of third party agents, consultants and the like)

Once these risks are identified and assessed, an organization can develop processes and controls to mitigate such risks. This entire process is known as the risk assessment process and serves as the lynchpin of an effective compliance program.

Development and Documentation of Processes, Procedures and Controls (*Creating the Work plan, Blueprint, Budget and Schedule*)

Processes, procedures and controls are really the heart of a compliance program in that they document the steps the organization takes to actually comply with the general standards contained in the policy. Effective processes, procedures and controls:

1. Should be written in a clear and concise manner;
2. Identify those activities that are permitted and prohibited;
3. Identify the means by which approvals for certain activities are obtained and documented; and
4. Identify the means by which potentially illegal or unethical activity should be reported.

This additional detail is captured so the Among the issues a compliance program should address is how the organization deals with third-party business partners. As noted above in Section III.B.1 and note 21, an organization can be liable for the activity conducted on its behalf by a third party business partner. To mitigate this risk a compliance program must include processes, procedures and controls to conduct due diligence on third party business partners. The specific nature and scope of the due diligence to be conducted on a third party should be driven by the potential level of risk that the third party relationship presents to the organization.

Amongst the factors that should be considered when assessing this risk, an organization should consider:

1. The services to be performed;
2. The location in which the services are to be provided;
3. The business rationale and purpose for requiring a third party;
4. The qualifications of the third party to provide the services;
5. The reputation and background of the third party, including whether the third party currently has or in the past had a relationship with a foreign government or served as a government official;
6. The compensation structure and specifically, including the presence of a success fee; and
7. Whether the total amount of compensation appears to be commensurate with the work to be performed.

It's important to remember that the due diligence conducted at the beginning of the relationship is a snapshot of the third party's status at that particular time. Therefore, it will be necessary not only to monitor performance under the contract, but also refresh or update the due diligence on a periodic basis.[41]

Training (*Cooperation, Communication and Collaboration***)**

An organization's compliance program won't work unless people throughout the organization are aware of, and understand, what is expected of them by the compliance program. Awareness and understanding of the compliance program is accomplished through training and education of the organization's directors, senior management, employees and certain third party business partners. There is no right or wrong answer with respect to the method by which training is provided (i.e., in-person or remote). There is however general agreement that effective training will address:

1. Relevant regulatory requirements, guidelines and expectations; and
2. Specific requirements and expectations of the organization's compliance program.

Furthermore, effective training is not a "one and done" event. While individuals subject to the compliance program should be trained and re-trained on a periodic basis, ad-hoc education is very important. Thus, distributing news and information about bribery and corruption-related matters throughout the organization is a great way to keep people informed.

Finally, the organization should have a process to document that employees have completed all required training as well as process to discipline those employees who have failed to satisfy their training requirements.

Incentives and Discipline (*Cooperation, Communication and Collaboration***)**

As noted above, for a compliance program to be considered effective, there must be evidence that it is being enforced. This means that a compliance program must:

1. Contain procedures for investigating potential illegal and/or unethical conduct and/or violations of the organization's compliance program;

[41] On a related note, organizations should ensure that in the context of mergers and acquisitions that they have processes to (i) conduct pre-acquisition due diligence to determine whether they may be assuming any bribery and corruption risks, including, but not limited to possible ongoing bribery and corruption related conduct; and (ii) integrate the target company's compliance program into the acquirer's compliance program

2. Provide for anonymous reporting of potential violations; and
3. Note that there are penalties for non-compliance that are commensurate with such conduct.

On a similar note,"DOJ and SEC recognize that positive incentives can also drive compliant behavior".[42] Such positive incentives may include positive evaluations, promotions and financial rewards.

Here's what U.S. Attorney General Loretta Lynch had to say about corporate compliance programs during an interview about the FCPA while she was the U.S. Attorney for the Eastern District of New York:

"The most important thing I learned about compliance programs is also the most basic thing—the tone at the top truly sets the parameters for whether one has an effective or ineffective compliance program. And by effective, I don't mean a program in a company where there is never any wrongdoing, because that company does not exist. If there is one message I'd like to leave with corporate America, it is that the government actually does understand that things can and will go wrong, even where there is a strong compliance program. Every company develops issues. It's how you deal with them that defines your corporate culture and informs me if you are serious about fixing the problem and preventing it from recurring going forward."[43]

A final note on compliance programs is that they should be considered living, breathing organisms requiring constant nurturing. Regulatory requirements, guidance and expectations change. An organization's risk tolerance may change. An organization's business may change. These changes may necessitate changes in the compliance program. With that in mind, the compliance program should be reviewed and tested on a periodic basis to ensure its continued efficacy. If deemed necessary, the compliance program should be enhanced to ensure that it remains regulatory compliant.

Conclusion

In 1977, during hearings relating to the enactment of the FCPA, the U.S. Senate noted:

"Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business."[44]

This sentiment was echoed in 2013 by then U.S. Attorney for the Eastern District of New York and current U.S. Attorney General Loretta Lynch, who said:

"Corruption, whether here in Brooklyn or on the other side of the globe, has real and far reaching consequences. The common thread is that someone in power loses their connection to the constituency they are supposed to serve, whether citizens or shareholders. When government officials engage in self-dealing, when they abdicate their responsibility, when they succumb to greed, the average citizen pays for it dearly and on many levels. Constituents everywhere end up spending more for services — infrastructure, healthcare, education —and sometimes have to go without these vital services, when government officials line their own pockets with public funds. Law-abiding companies here in the U.S. and abroad are placed at a

[42] FCPA Resource Guide at 60.

[43] In the Spotlight: Loretta Lynch, Compliance and Ethics Professional, September-October 2013, pp. 65-72), (hereinafter Lynch in the Spotlight). Available at http://www.justice.gov/usao/nye/pr/2013/doc/cep-2013-09-turteltaub-lynch.pdf.

[44] See S. Rep 95-114 at pg. 4.

competitive disadvantage when business is won or lost based on bribes, not the quality of a company's products and services.

And because orruption involves, at its heart, the breaking of a trust relationship, its ramifications often go far beyond the financial. Corruption infects society as a whole, increasing the level of cynicism and distrust that constituents have about their elected officials and government processes."[45]

Enforcement of anti-bribery and corruption regulations is clearly on the radar for U.S. and international regulators and prosecutors and no industry is immune. With this in mind, organizations need to be vigilant and proactive n ensuring that they have deployed a robust and comprehensive anti-bribery and corruption compliance program.

Future Efforts of the Navigant Construction Forum™

In the fourth quarter of 2015, the Navigant Construction Forum™ will issue another research perspective analyzing construction industry issues. Further research will continue to be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this research perspective have ideas on further construction dispute related research that would be helpful to the industry, you are invited to e-mail suggestions to jim.zack@navigant.com.

Navigant Construction Forum™

Navigant (NYSE: NCI) established the Navigant Construction Forum™ in September 2010. The mission of the Navigant Construction Forum™ is to be the industry's resource for thought leadership and best practices on avoidance and resolution of construction project disputes globally. Building on lessons learned in global construction dispute avoidance and resolution, the Navigant Construction Forum™ issues papers and research perspectives; publishes a quarterly e-journal (Insight from Hindsight); makes presentations globally; and offers in-house seminars on the most critical issues related to avoidance, mitigation and resolution of construction disputes. Copies of the Forum's white papers, research perspectives and issues of Insight from Hindsight may be found and downloaded from the Forum's web page http://www.navigant.com/NCF.

[45] See Lynch in the Spotlight..

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