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Beware FCPA Risks When Courting Foreign Investment

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(November 7, 2018, 1:36 PM EST)

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A recent uptick in foreign investment in the United States may present an unanticipated challenge to American businesses seeking to make the most of those opportunities. Whether a business is operating exclusively on a domestic basis or is one that has concentrated its anti-corruption compliance resources overseas, U.S.-based companies big and small need to be aware of the risks under the Foreign Corrupt Practices Act presented by interactions with potential investors that have ties to foreign governments.

It makes sense that employees of American companies working entirely in the U.S. may not be so focused on a law that begins with the word "foreign," especially when enforcement authorities have been laser-focused on conduct occurring overseas. Even Congress may not have been focused on the domestic implications of foreign investment when it enacted the FCPA.[1] The 1977 report from the Senate Committee on Banking, Housing, and Urban Affairs focused squarely on the effect foreign bribes had on overseas business as the "need for legislation."[2]

However, American companies should not lose sight of the fact that improper payments to foreign officials in the U.S. are also subject to the anti-bribery provisions of the FCPA.[3] Domestic operations seeking investments or partnerships from foreign state-owned or controlled entities should proceed with caution to ensure that their activities comply with the FCPA and to minimize exposure to risk of investigation or enforcement action.

Growing FDI in the U.S.

There is good reason that many domestic concerns — like American employees working entirely in the U.S. and their employers — may not have worried much about violating the FCPA. Foreign direct investments only started to grow in a significant way after the enactment of the FCPA.[4] In the period between 1970 and 2017, net inflows of FDI into the U.S. as a percentage of gross domestic product increased from 0.117 percent to 1.83 percent with major spikes in 2000 (3.404 percent), 2007 (2.394 percent) and 2015 (2.809 percent).[5] The growth is also evident in raw dollars, according to SelectUSA, the U.S. governmentwide program led by the U.S. Department

of Commerce that helps facilitate FDI in the U.S. FDI grew in the U.S. between 2013 to 2017 from $2.72 trillion to $4.02 trillion.

The profile of FDI recipients in the U.S. has also changed. U.S. manufacturing — a targeted sector of the Trump administration — took center stage as the largest recipient of FDI in the U.S. receiving a total of $1.6 trillion in 2017.[6] This represents a 25 percent increase in FDI in U.S. manufacturing between 2014 and 2015, while foreign spending in the banking sector dropped by 10 percent.[7]

Another major change to FDI relevant to the FCPA is the investor profiles. While the United Kingdom, Canada, Japan, Germany and Ireland are the largest existing sources of FDI in the U.S., they are not the fastest growing.[8] The fastest-growing investors in the U.S. are Greece, Argentina, Thailand, Singapore and China.[9] The changing profile of countries investing in the U.S. is meaningful because the countries historically holding the largest sources of FDI in the U.S. ranked, eighth, eighth, 20th, 12th and 19th, respectively, on the Transparency International, Corruption Perceptions Index in 2017.[10] But the countries with the fastest growing FDI in the U.S. ranked 59th, 85th, 96th, sixth and 77th, respectively, on the same index,[11] meaning that corruption may be more commonplace in countries looking to make significant investments in the U.S. today.

Looking ahead, it is likely that other countries — and their state-owned enterprises — will look to the U.S. as a place to invest as well. For example, state-owned oil and gas companies are investing billions in America's oil and gas fields at a time when rival U.S. exporters are expanding.[12] The Trump administration also appears to be focusing heavily on investments from the Middle East in defense manufacturing.[13] And while there has been some consternation about Chinese state-owned companies buying or controlling American businesses,[14] Chinese state-owned entities have started turning to greenfield investments to invest their dollars in the U.S.[15]

As the growth of FDI in the U.S. continues, U.S.-based companies and their employees should focus on the risk that they are interacting with "foreign officials" — as defined by the FCPA and the courts — even if that interaction takes place entirely within the United States.

Initial Steps to Protect Against Improper Conduct

With this FDI background in mind, companies courting foreign investment, particularly from state-owned or controlled entities, should ensure that the following staples of anti-corruption compliance are in place to protect against potential FCPA violations.

The first principle is to ensure that a broad definition of "foreign official" is used within a company's policy and procedures. The FCPA statute itself states that a "foreign official" includes:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[16]

Congress has not defined what constitutes an "instrumentality" of a foreign government. However, in numerous settlements and charging documents, U.S. enforcement authorities have interpreted "instrumentality" broadly to include state-owned commercial entities, and they have used that interpretation to extend the FCPA to cover bribery of employees of such companies. The U.S. Court of Appeals for the Eleventh Circuit appeared to endorse this interpretation in a decision in 2014,[17] and it

continues to be reflected in recent FCPA settlements. For example, a 2016 U.S. Department of Justice resolution with Odebrecht SA, a global construction conglomerate based in Brazil, alleged approximately $788 million in bribes to Brazilian government officials, including several officials from Petrobras, Brazil's state-owned oil company.[18]

In addition to the broad definition of "foreign official," companies should know that state-owned entities are found in a wide array of industries, including telecommunications, oil and gas, transportation, health care, postal services, and banking. For example, the U.S. Securities and Exchange Commission recently alleged that Panasonic Corp. provided a "lucrative consulting position" to the executive of a state-owned, Middle Eastern airline, who the SEC deemed to be a "government official."[19] Given the variety of businesses that might have ties to foreign governments, and the low threshold for what enforcement authorities and the courts have defined as a "foreign official," companies interacting with foreign investors should take steps necessary to confirm what relationships, if any, a foreign investor has with its home government.

In addition to the definition of "foreign official," U.S. enforcement authorities interpret other aspects of the FCPA broadly. As explained above, the statute prohibits the corrupt "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of *anything of value* to" a foreign official.[20] While many cases involve payments of cash, other transfers of value, including travel expenses, gifts and even hiring relatives of foreign officials, have been considered subject to the FCPA.

Furthermore, companies should take extra care when relying on a third party or an agent as an intermediary with a foreign investor or foreign officials. The FCPA prohibits not only direct corrupt payments, but also indirect corrupt payments made using third parties. U.S. enforcement authorities tend to be especially suspicious of third parties, including agents, consultants and distributors, used to interact with foreign officials, which they view as "commonly used to conceal the payment of bribes to foreign officials in international business transactions."[21] Indeed, a substantial majority of FCPA enforcement actions has involved the use of third parties. To guard against potential anti-corruption liability, companies working with foreign investors with ties to foreign governments should exercise caution when using third parties to interact with government officials on its behalf. This is especially true if a foreign official recommends the use of a specific third party to facilitate some aspect of a transaction or relationship. Due diligence screening should be performed on all potential third parties, including examining the ownership interests and the reputation of a third party, among other things.

Beyond the Initial Steps

While these initial steps are important to ensuring compliance with the FCPA, they are not an exhaustive list of considerations to take into account when interacting with foreign officials. For companies looking to seize upon the opportunities presented by foreign direct investments, it is critical to pay attention to the corruption risks these investments may create.

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[1] See generally S. Rep. No. 95-114 (1977).

[2] Id. at 3-4. From a domestic perspective, the report seemed more concerned with the effect these overseas practices were having on the domestic competitive climate than on bribery of foreign officials on our shores. “Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas 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.” Id. at 4.

[3] See 15 U.S.C. § 78dd-2. Under the statute a “domestic concern” is “any individual who is a citizen, national, or resident of the United States” and it is unlawful for domestic concerns “to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to… any foreign official.” Id.

[4] https://www.nber.org/chapters/c6536.pdf, page 5.

[5] https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=US&name_desc=true.

[6] https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000HBGy.

[7] https://fas.org/sgp/crs/misc/RS21857.pdf, page 11.

[8] https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000LKSn.

[9] https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000LKSn.

[10] https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table.

[11] https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table.

[12] https://www.hydrocarbons-technology.com/news/qatar-petroleum-invest-20bn-us-oil-gas-fields/.

[13] https://www.reuters.com/article/us-saudi-usa-trump-deals-idUSKCN18G05P.

[14] https://www.businessinsider.com/ap-congress-urged-to-bar-us-acquisitions-by-china-state-firms-2016-11.

[15] https://www.nationalreview.com/corner/china-greenfield-investments-national-security-threat/.

[16] See Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1)(A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[17] See United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014). In United States v. Esquenazi, the court adopted the U.S. Department of Justice’s fact-based approach to determine whether a state-owned entity is an “instrumentality” under the FCPA. The court articulated a list of factors, including “the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which

the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed."

[18] https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[19] https://www.sec.gov/litigation/admin/2018/34-83128.pdf.

[20] See Section 30A(a), 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), 78dd3(a) (emphasis added).

[21] https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf, page 60.