INSIGHTS

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SECURITIES ENFORCEMENT

The Foreign Corrupt Practices Act: Recent Developments, Trends, and Guidance

An explosion of enforcement activity from the SEC and Department of Justice with respect to violations of the FCPA is likely to continue. A new development is shareholder suits seeking to take advantage of alleged FCPA violations. In this context, companies need to pay particular attention to their due diligence in M&A transactions and see that they have an effective compliance program to deter FCPA violations.

by F. Joseph Warin, Robert C. Blume, Jeremy A. Bell, and J. Taylor McConkie

The Foreign Corrupt Practices Act (FCPA)[1] is 30 years old this year, and the anniversary is being celebrated with an explosion of enforcement activity by both the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Coupled with this sudden proliferation—recently punctuated by the record $26 million criminal fine levied on three Vetco International Ltd subsidiaries in February 2007—is a rise in shareholder-initiated civil litigation. This article highlights significant FCPA enforcement activities in 2006, discusses the trends we glean from that activity, and provides practical guidance to help companies avoid or limit FCPA liability.

FCPA Overview

The FCPA's anti-bribery provisions make it illegal to make payments of money or anything of value to any foreign government official or foreign political party in order to obtain or retain business or secure any improper advantage.[2] The anti-bribery provisions apply to "issuers," "domestic concerns," and "any person" that violates the FCPA while in the territory of the United States.[3] The term "issuer" covers any business entity that is registered under Section 12 or is required to file reports under Section 115(d) of the Securities Exchange Act of 1934 (Exchange Act).[4] In this context, foreign issuers whose ADRs are traded on US exchanges are "issuers" for purposes of this statute. The term "domestic concern" is even broader and includes any US citizen and any business entity that is organized under the laws of a US state or that has a principal place of business in the United States.

In addition to the anti-bribery provisions, the FCPA's books and records provision requires issuers to make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets.[5] Finally, the FCPA's internal controls provision requires the issuer to devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.[6]

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2006 in Review

2006 marked one of the busiest years in FCPA enforcement and further evidenced the recent proliferation of FCPA enforcement activity. Several high-profile FCPA enforcement actions, including charges against four companies and numerous individuals, were brought by either the DOJ or SEC. Along with this explosion of enforcement activity comes warnings from the DOJ and the Federal Bureau of Investigation of "increased vigilance" in pursuing FCPA cases. For example, in a speech on October 16, 2006, Assistant Attorney General Alice Fisher made clear that the FCPA is a "high priority":

> Do we care about the FCPA? Is the FCPA relevant in today's global business climate? Is enforcing the FCPA a high priority? The answer to all of those questions is yes. Prosecuting corruption of all kinds is a high priority for the Justice Department and for me as head of the Criminal Division. That includes public corruption, corruption in the procurement process, and the Foreign Corrupt Practices Act.[7]

Among the most important 2006 enforcement actions against corporations are:

In the Matter of Oil States International, Inc.[8] On April 27, 2006, the SEC announced that Oil States International, Inc., a Houston-based oil drilling service provider, had consented to the entry of an administrative order requiring the company to cease and desist from committing any future books and records or internal controls violations. The SEC did not impose any financial penalties on Oil States.

This case involved alleged improper payments made by a Venezuelan subsidiary of Oil States International to officials of Venezuela's state-owned oil company, Petroleos de Venezuela, S.A. (PDVSA). The Venezuelan subsidiary had hired a consultant to interface with the PDVSA. The consultant, together with three of the subsidiary's employees, then engaged in a kickback scheme whereby the subsidiary paid approximately $348,000 in improper payments to PDVSA employees. After discovering the kickback scheme, Oil States undertook extensive corrective and remedial measures and voluntarily reported its findings to the SEC and DOJ. In declining to impose financial penalties, the SEC noted that it considered Oil States' extensive remedial acts and its cooperation with the SEC staff.

Schnitzer Steel Industries, Inc.[9] On October 16, 2006, the DOJ and SEC announced a plea and settlement with Schnitzer Steel Industries, Inc., based in Portland, Oregon, and its foreign subsidiary, SSI Korea. In the plea documents, SSI Korea admitted that it violated the FCPA's anti-bribery provisions by making more than $1.8 million in corrupt payments over a five-year period to government-owned steel mill managers in China. SSI Korea made the payments to induce the steel mill managers to purchase scrap metal from Schnitzer Steel. The bribes, which took the form of commissions, refunds, and gratuities via off-book bank accounts, led to a substantial increase in business. In addition, the SEC also alleged that Schnitzer Steel violated the FCPA's books and records and internal controls provisions.

To settle the criminal and administrative charges levied against it for violating the FCPA, Schnitzer Steel agreed to pay a total of $15.2 million. In the criminal proceeding, the company's wholly owned subsidiary, SSI Korea, pleaded guilty to violations of the FCPA's anti-bribery and books and records provisions. SSI Korea agreed to pay a $7.5 million criminal fine. The DOJ deferred prosecution against Schnitzer Steel, the parent corporation. In the deferred prosecution agreement, Schnitzer Steel accepted responsibility for the conduct of its employees and agreed to enhance its internal compliance measures. The deferred prosecution agreement also provided for the appointment of an independent compliance consultant to review Schnitzer Steel's compliance program and monitor the implementation of new internal controls related to the FCPA. In the parallel SEC administrative proceeding, Schnitzer Steel consented to the entry of a cease-and-desist order and agreed to pay a $7.7 million civil penalty.

Statoil, ASA.[10] On October 13, 2006, the DOJ and SEC announced that Statoil ASA, an international oil company in Norway whose ADRs are traded on the New York Stock Exchange, had agreed to pay a total of $21 million to settle criminal and

administrative charges for violating the FCPA's anti-bribery and accounting provisions. Pursuant to a deferred prosecution agreement, Statoil agreed to a $10.5 million criminal penalty and the appointment of an independent compliance consultant who will review and report on Statoil's FCPA compliance. In the parallel SEC administrative proceeding, Statoil consented to the entry of an administrative order requiring the company to cease and desist from committing any future FCPA violations, and to pay disgorgement of an additional $10.5 million.

Individual Enforcement Actions

The DOJ and SEC also aggressively pursued individuals last year who were alleged to have violated the FCPA:

- ***United States v. Richard John Novak:***[11] On March 20, 2006, Richard John Novak pleaded guilty to violating the FCPA, wire fraud, and mail fraud statutes. Novak operated a "diploma mill" that issued fraudulent diplomas from falsely accredited universities. Novak made payments to Liberian diplomats and officials to induce them to issue certificates of accreditation for Novak's fictitious universities. Novak's sentencing was continued until December 2007 because he is offering ongoing assistance to the DOJ in criminal proceedings against Novak's co-defendants, who are scheduled for trial in October 2007.
- ***United States v. Steven Lynwood Head:***[12] On June 23, 2006, Steven Lynwood Head, the former CEO of Titan Africa, Inc., pleaded guilty to falsifying the books and records of an issuer under the FCPA. In the guise of "advanced social payments," Head authorized the payment of approximately $2 million to the President of Benin's reelection campaign and then submitted false invoices to hide the payments. Head is expected to be sentenced in March 2007. Head's former employer, Titan Africa, Inc., pleaded guilty in 2005 to FCPA violations in a well-publicized prosecution, and paid $28.5 million in criminal penalties, disgorgement, and prejudgment interest.
- ***SEC v. John Samson, John Munro, Ian Campbell, and John Whelan:***[13] On July 5, 2006, the SEC filed a complaint against four employees of ABB Ltd. for alleged violations of the FCPA. The criminal and enforcement proceedings against ABB and its subsidiaries resulted in fines and penalties totaling more than $16 million. The four employees allegedly participated in a scheme to bribe Nigerian government officials in furtherance of ABB's bid to obtain a lucrative contract to supply oil drilling equipment in Nigeria.

The four employees consented to the entry of final judgments that (1) permanently enjoined them from future FCPA violations, (2) ordered each to pay a civil penalty ($50,000 as to Samson, and $40,000 each for Munro, Campbell, and Whelan), and (3) ordered Samson to pay $64,675 in disgorgement and prejudgment interest.

This action derived from another proceeding in 2004, in which ABB subsidiaries pleaded guilty to violating the anti-bribery provisions of the FCPA and ABB entered into a cease-and-desist order with the SEC.

- ***United States v. Faheem Mousa Salam:***[14] On August 4, 2006, Faheem Mousa Salam pleaded guilty to one count of violating the FCPA's anti-bribery provisions. As a translator working in Iraq, Salam admitted offering a bribe to an Iraqi official to induce the official to purchase a printer and 1,000 armored vests. On February 2, 2007, Salam was sentenced in the US District Court for the District of Columbia to three years in prison. This sentence, coupled with the sentences imposed on former American Rice executives David Kay and Douglas Murphy (discussed below), demonstrates that FCPA violations will be met with harsh, long prison sentences.

Coming Attractions

- **Consequences of delayed Exchange Act filing**
- **Protecting the rights of minority shareholders in private companies**
- **Written consent best practices**

- ***SEC v. David M. Pillor:***[15] David Pillor was the former Senior Vice President of Sales and Marketing for InVision Technologies, Inc. In December 2004, InVision entered into a non-prosecution agreement with the DOJ, and in February 2005, InVision settled with the SEC. On August 15, 2006, the SEC settled charges against Pillor for alleged violations of the FCPA for failing to maintain an adequate system of internal controls and for causing the falsification of the company's books and records. Pillor agreed to pay a $65,000 civil penalty and consented to a permanent injunction from future FCPA violations.
- ***United States v. Yaw Osei Amoako:***[16] On September 6, 2006, Yaw Osei Amoako, a former regional manager of ITXC Corporation, pleaded guilty to one count of conspiring to violate the FCPA's anti-bribery provisions. Amoako pleaded guilty to paying approximately $266,000 in bribes to employees of foreign state-owned telecommunications carriers in various African countries. Amoako is expected to be sentenced in February 2007.
- ***SEC v. Jim Bob Brown:***[17] On September 14, 2006, the SEC settled a civil enforcement against Jim Bob "J.B." Brown, a former employee of a subsidiary of Willbros Group, Inc. The SEC alleged violations of the FCPA's anti-bribery, books and records, and internal controls provisions by Brown, who participated in a scheme to bribe foreign officials in Nigerian and Ecuadorian government-owned oil companies. Brown consented to a permanent injunction against future FCPA violations. Although Brown agreed to settle the SEC's claim for injunctive relief, he has not settled the SEC's claim for monetary penalties. Those proceedings have been stayed pending the outcome of a parallel criminal proceeding.

Reported Cases

On December 8, 2006, the Second Circuit issued an opinion in United States v. James H. Giffen.[18] This case involved an interlocutory appeal by the DOJ from the district court's order in the FCPA trial denying the government's motion to preclude Giffen from raising a defense that he was authorized to act by public officials ("public authority defense"). Giffen had argued that he was a government informant, acting on behalf of "an agency of the US government," and therefore he lacked the corrupt intent necessary to sustain an FCPA violation. The district court had ruled previously that Giffen was entitled to review classified government documents to assess the viability of his public authority defense. But when Giffen proffered the classified documents to use at trial in support of his public authority defense, the government objected and moved to preclude the defense. The district court overruled the objection and permitted Giffen to present evidence of a public authority defense at trial. The government appealed. The Second Circuit refused to hear the appeal, however, after determining that the government's interlocutory appeal was premature. Nevertheless, in dicta, the Court opined that the district court may have misunderstood the requirements of the public authority defense. According to the Second Circuit, the defense would not apply in this case because the evidence proffered by Giffen showed only that he may have been a government agent charged with "stay[ing] close to the President [of Kazakhstan]" and reporting possible criminal activity to US authorities. This authority did not authorize Giffen to violate the FCPA as alleged in the indictment.[19]

The 2007 Docket

A review of FCPA actions pending in 2007 suggest that the trend of increasing enforcement will continue. Following are several examples:

- ***United States v. Viktor Kozeny et al.:***[20] On October 6, 2005, the DOJ announced that a federal grand jury in the Southern District of New York had indicted Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton for allegedly participating in a massive scheme to bribe government officials in Azerbaijan. The three men allegedly bribed government officials to ensure that those officials would privatize Azerbaijan's state-owned oil company, thus allowing Kozeny, Bourke, Pinkerton, and others to share in the anticipated profits arising from that privatization. Although Bourke and Pinkerton have appeared in the case, Kozeny has refused to appear. He has been arrested in the Bahamas and the United States is seeking his extradition. A court in the Bahamas has ordered Kozeny's extradition, but that ruling is pending on appeal.

- ***SEC v. Steven Ott and Michael Young:***[21] On September 6, 2006, the SEC sued Steven Ott and Michael Young, both former executives of ITXC Corporation, in the US District Court for the District of New Jersey. The SEC alleges that Ott and Young violated the FCPA by approving and negotiating bribes paid to foreign state-owned telecommunications carriers in various African countries. The SEC seeks injunctions, disgorgement of ill-gotten gains, and civil penalties. All discovery has been stayed pending conclusion of the DOJ's parallel criminal prosecution, which is ongoing.
- ***SEC v. Yaw Osei Amoako:***[22] The SEC also has another pending civil enforcement action against another former ITXC employee, Yaw Osei Amoako, which was filed on September 1, 2005, in the US District Court for the District of New Jersey. The SEC's complaint alleges that Amoako bribed a senior official of the government-owned telephone company in Nigeria, in order to obtain a lucrative contract for ITXC. The SEC is seeking an injunction, disgorgement of ill-gotten gains, and civil penalties. This civil action has been stayed pending the final outcome of the criminal proceedings mentioned above.
- ***United States v. Kay and Murphy:*** In 2002, the Justice Department indicted David Kay and Douglas Murphy, two former employees of American Rice, Inc., for violating the FCPA by making improper payments to Haitian government officials to reduce customs and sales taxes on rice imported by American Rice. According to the indictment, Kay and Murphy bribed customs officials to understate the true amount of rice imported by American Rice, thereby subjecting American Rice to lower customs duties and sales taxes. The original issue for the court was how broadly it should interpret the FCPA's statutory prohibition on the making of payments to foreign officials to "obtain or retain business."

The district court dismissed the indictment, holding that the statutory language "to obtain or retain business" applied only to payments that lead directly to the obtaining of new or the retaining of old business, which, the district court held, had not occurred here.[23] The Fifth Circuit, however, reversed the district court's decision.[24] Relying on the legislative history of the FCPA and its amendments, the court held that Congress intended the "obtain or retain business" language to apply to any payments to foreign officials intended to either directly or indirectly assist the payor in obtaining or retaining business. The Fifth Circuit noted that bribes to foreign officials to secure illegally reduced customs and sales taxes, if intended to assist someone in obtaining or retaining business, could fall with the FCPA's anti-bribery provisions.

After remand, a jury found Kay and Murphy guilty of violating the anti-bribery provisions of the FCPA. In June 2005, the Court sentenced Kay to 37 months imprisonment and Murphy to 63 months imprisonment. Both defendants have appealed their convictions and sentences; the appeals are currently pending in the Fifth Circuit. One of the issues before the Fifth Circuit will be whether the district court properly instructed the jury on the *mens rea* element of an offense under the FCPA. The DOJ acknowledged that the district court failed to properly instruct the jury that the FCPA has both "willfulness" and "corruptly" elements. Nevertheless, the parties disagree about the meaning of "willfulness" under the FCPA, and, specifically, whether the FCPA requires a showing by the government that the defendant acted with intent to violate the FCPA.

DOJ Opinion Procedure Release

On October 16, 2006, the DOJ issued its first FCPA Opinion Procedure Release since September 3, 2004.[25] The DOJ stated that it would not take enforcement action against a company proposing to contribute $25,000 to the customs department of an African country. In approving the transaction, the DOJ noted that there was no corrupt intent associated with the payment and that the payment was to the government and not to a foreign official. In commenting on the release, Assistant Attorney General Alice Fisher remarked that "the FCPA opinion procedure has generally been under-utilized" and that she wants it "to be something that is useful as a guide to business."

Trends

With the increase in enforcement activity, we see several important trends developing in the arena of FCPA enforcement, many of which were directly

addressed by Assistant Attorney General Fisher in her recent speech.

Voluntary Disclosures

The number of voluntary disclosures continued to rise in 2006. Seventeen of the twenty newly disclosed FCPA investigations during the past two years were voluntarily disclosed to the DOJ or SEC following internal investigations by the companies. In the early 2000s, by contrast, the government initiated most of the reported investigations. In encouraging companies to voluntarily disclose transgressions, Assistant Attorney General Fisher noted that, although the result of voluntary disclosure is uncertain, it will result "in a real, tangible benefit."[26] As explained below, there are various factors a company must consider when deciding whether to voluntary disclose an FCPA violation.

Appointment of Monitors and Consultants

In several of the most recent FCPA dispositions, the DOJ and SEC have required the company to appoint monitors or consultants to ensure FCPA compliance. In addition to ABB, Diagnostic Products Corporation, DPC (Tianjin) Ltd., InVision, Micrus, Monsanto, and Titan, all of which were required to make such appointments in the past few years, in 2006 both Schnitzer Steel and Statoil were required to hire a compliance consultant to review the company's system of FCPA internal controls. Notwithstanding this recent trend, however, Assistant Attorney General Fisher explained that "there is no presumption that a compliance consultant is required in every FCPA disposition."[27] According to Ms. Fisher, when considering whether to require a compliance consultant, the DOJ will consider "the strength of the company's existing management and compliance team, the pervasiveness of the problem, and the strength of the company's existing FCPA policies and procedures."[28]

Increased Penalties

Enforcement activity in 2006 continued the trend of increasing the severity of penalties. Looking back, the SEC first required a company to disgorge the profits of its unlawful FCPA activities in 2004. Today, the practice appears to have become standard fare. In October 2006, for example, Statoil ASA agreed to a DOJ fine of $10.5 million and SEC disgorgement of an additional $10.5 million.[29] Schnitzer Steel's Korean subsidiary agreed to a DOJ fine of $7.5 million while Schnitzer Steel agreed to pay the SEC $7.7 million in disgorgement and prejudgment interest.[30]

Increasingly Broad Jurisdictional Nexus

US enforcement authorities have shown a willingness to reach far and wide outside traditional jurisdictional boundaries and think creatively when assessing the connection that the company or activity has with the United States. The Statoil matter marked the first time that the DOJ has taken criminal enforcement action against a foreign issuer for violating the FCPA. Assistant Attorney General Fisher noted that the criminal enforcement action against Statoil was intended as "a clear message" to foreign companies trading on the American exchanges that they must comply with US laws.[31] Ms. Fisher added that "[t]his prosecution demonstrates the Justice Department's commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope."[32]

Ongoing Civil Liability—Private Litigants/Shareholders

Although the FCPA does not grant a private right of action, 2006 may have created a glimmer of promise for hopeful securities, class-action plaintiffs under the FCPA. Following Immucor's announcement of a formal SEC investigation into allegations of an improper payment under the FCPA, a shareholder class filed a complaint under Sections 10-b and 20(a) of the Exchange Act.[33] The suit alleged that Immucor's statements in securities filings, two of its press releases, and an analyst teleconference, all of which tended to underplay the severity of the potential FCPA violations, constituted material misstatements and omissions. Notably, similar shareholder suits against InVision Technologies and Syncor International Corporation had been dismissed by district courts for failure to meet the pleading requirements of the Private Securities Litigation Reform Act (PSLRA). On October 4, 2006, the District Court for the Northern District of Georgia denied Immucor's motion to dismiss the shareholder claim. The court found that the plaintiffs had adequately alleged

false or misleading statements, that the facts alleged regarding the various statements (notably an attribution of the payments' costs to "bookkeeping" errors) did support the heightened pleading requirements as to scienter under the PSLRA. In other words, for the first time, a federal court held that plaintiffs had met the heightened pleading requirement for fraud under the PSLRA in an FCPA case.

Currently, more than 24 other major corporations are under SEC investigation for FCPA violations. This landscape may provide fertile ground for plaintiffs' counsel in search of a class to fashion FCPA-based suits. Though corporate defendants historically have succeeded in challenging the standing of FCPA-based shareholder actions, cases like Immucor suggest that, especially in the current environment of heightened scrutiny, such claims may start to gain traction. Regardless of outcome, however, one thing is clear: the legal road towards resolving an FCPA violation in the United States now stretches far beyond achieving peace with the SEC.

Also of special note is the United Nations Convention Against Corruption, which requires member states to provide a private right of action for those who suffer damages as a result of an "act of corruption."[34] The US Senate provided its Advice and Consent to the U.N. Convention on September 15, 2006, but in so doing, specifically made the reservation that US law would remain unchanged and that no new private right of action was created in the United States. Nevertheless, to date 140 countries have become signatories to the U.N. Convention and it has been ratified by 80 countries. Thus, although US law remains unchanged, US companies should be aware that other countries may provide for a private right of action, which could subject US companies to increased litigation in foreign jurisdictions.

Practical Guidance

In light of developments over the past year concerning the FCPA, we offer the following guidance.

Deciding Whether to Make a Voluntary Disclosure

Although not mandated by the FCPA, voluntary disclosure of an FCPA violation to the DOJ and/or SEC, as appropriate, may help a company avoid prosecution or obtain partial mitigation of civil and criminal penalties. Although there is no way to quantify the mitigation impact of a voluntary disclosure, a review of the Statoil, Schnitzer Steel, and Oil States International cases suggests strongly that voluntary disclosure and exceptional cooperation can result in relatively lenient criminal and administrative sanctions. Schnitzer Steel, for instance, voluntarily disclosed its wrongdoing to the DOJ, conducted an extensive internal investigation, shared the results of the investigation promptly, cooperated extensively with the DOJ's ongoing investigation, took appropriate disciplinary action against wrongdoers, replaced senior management, and took additional significant remedial actions, including the implementation of a robust compliance program. Assistant Attorney General Fisher explained that Schnitzer's "exceptional cooperation". . ."was critical to its ability to obtain a deferred prosecution agreement" and a DOJ recommendation that it pay a fine "well below what it would otherwise have received."[35] Ms. Fisher added that "voluntary disclosure followed by extraordinary cooperation with the Department results in a real, tangible benefit to the company."[36]

Notwithstanding Ms. Fisher's comments, however, the "credit" given for voluntary disclosure and cooperation in any particular case remains uncertain. Perhaps disposition of cases pending in 2007 will enlighten this further. In the meantime, however, corporations must weigh the potential benefits of a voluntary disclosure, including mitigation, against the costs of such disclosure, including the expense and resources required to cooperate with a government investigation, the uncertain scope of civil and criminal penalties, the risk and expense of private litigation, and the public relations and business consequences, both in the United States and overseas.

Due Diligence Is Necessary

In the merger and acquisition context, and because of the substantial civil and criminal penalties possibly imposed for violations of the FCPA, corporations must remain focused on proper diligence before, during, and after the proposed acquisition. Of note, three recent FCPA enforcement actions (ABB, GE/InVision, and Titan Corporation) came to light during M&A due diligence.

Although the type and scope of FCPA due diligence required before an acquisition will vary depending on the particular risks involved, most pre-acquisition FCPA due diligence should contain the following elements:

- A determination of the risk that the target company has engaged in violations of the FCPA, based on the target company's line of business and the countries where the target company is located or does business;
- A review of the effectiveness of the target company's FCPA compliance program and policies and procedures for marketing-and-entertainment-related expenditures;
- Interviews with employees of the target company and other knowledgeable individuals regarding rumors of unethical or suspicious conduct by the target company, its employees, or its agents, consultants or representatives;
- A review of the target company's books, records and accounts to determine whether such books, records and accounts accurately and fairly reflect all transactions and expenditures by the target company;
- An enhanced review of all contracts between the target company and any foreign government, foreign government-controlled entity, foreign government employee or foreign political candidate;
- An enhanced review of all contracts between the target company and any foreign agent, consultant or representative of the target company; and
- An enhanced review of any "red flags" indicating that violations of the FCPA may have occurred.

Maintain Adequate Compliance Program and Internal Controls

To minimize exposure to penalties under the FCPA, companies should establish, implement, and maintain an effective FCPA compliance program. This program must be designed to deter violations of the FCPA and detect possible violations of the FCPA before they occur. An effective FCPA compliance program also must be tailored to a company's size, line of business, scope of international operations, and associated risk of violating the FCPA, among other factors. At the very least, an effective compliance program should contain the following:

- *Policy Statement/Code of Conduct:* The CEO or other member of senior management should issue a company-wide policy statement, included in the company's Code of Conduct, that clearly affirms the company's commitment to comply fully with the FCPA and to maintain the highest level of ethical standards in the conduct of its business.
- *Compliance Manual:* The company should prepare and distribute an FCPA Compliance Manual containing written standards and guidelines to be followed by the company's officers, directors, employees and agents to ensure their full compliance with the FCPA.
- *Compliance Officer:* The company should designate an individual from the company's senior management or general counsel's office to serve as the company's FCPA Compliance Officer.
- *Education and Training Programs:* The company's FCPA compliance program should include appropriate educational and training programs for all of the company's directors, officers, employees and agents.
- *Confidential Hotline:* The company should establish a confidential telephone hotline that may be used by the company's officers, directors, employees and agents to report any suspected or actual violation of the company's FCPA Compliance Manual.
- *Internal Audit:* In addition to regular financial audits, the company should periodically review and test compliance with its FCPA compliance program.
- *Miscellaneous:* An effective compliance program should also: (i) require annual certifications from employees that they have reviewed and agreed to comply with the FCPA Compliance Manual; (ii) help avoid unusual or extravagant payments or gifts; (iii) prohibit or require approval of gifts; (iv) provide FCPA guidance in all foreign languages where the company conducts business; (v) encourage employees to elevate FCPA issues; (vi) thoroughly screen third-party agents; and (vii) identify "red flags."

Given the continued proliferation of FCPA enforcement activity in 2006, we expect US

authorities to initiate an increasing number of enforcement actions in the next few years and to seek more severe penalties for FCPA violators. A company's investment in an effective FCPA compliance program could help it avoid liability altogether or reduce the severity of penalties imposed against the company if it or one of its officers, directors, employees or agents violates the FCPA.

NOTES

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (amended 1988 and 1998), *codified* at 15 U.S.C. §§ 78m-78ff.
2. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
3. *Id.*
4. 15 U.S.C. § 78m(b)(2).
5. 15 U.S.C. § 78m(2).
6. *Id.*
7. *See* Prepared Remarks of Alice S. Fisher, Assistant Attorney General, US Department of Justice, at the American Bar Association, National Institute on the Foreign Corrupt Practices Act, October 16, 2006, at *http://www.usdoj.gov/criminal/press_room/speeches/2006_index.html#10*.
8. *In the Matter of Oil States Int'l, Inc*., SEC Administrative Proceeding File No. 3-12280 (April 27, 2006).
9. *In the Matter of Schnitzer Steel Indus., Inc*., SEC Administrative Proceeding File No. 3-12456 (Oct. 16, 2006); US Department of Justice, "Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine," available at *www.usdoj.gov/criminal/press_room/press_releases/2006_4809_10-16-06schnitzerfraud.pdf* (Oct. 16, 2006).
10. *In the Matter of Statoil, ASA*, SEC Administrative Proceeding File No. 3-12453 (Oct. 13, 2006); US Department of Justice, "U.S. Resolves Probe Against Oil Company that Bribed Iranian Official," available at *http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html* (Oct. 13, 2006).
11. *United States v. Richard John Novak* (No. 05-180-3-LRS) (E.D. Wash. March 20, 2006).
12. *United States v. Steven Lynwood Head* (No. 06-cr-01380) (S.D. Cal. June 23, 2006).
13. *SEC v. John Samson, John Munro, Ian Campbell, and John Whelan*, Litigation Release No. 19754 (July 5, 2006), available at *http://www.sec.gov/litigation/litreleases/2006/lr19754.htm*.
14. *United States v. Faheem Mousa Salam* (No. 06-cr-00157-RJL) (D.D.C. 2006); US Department of Justice, "U.S. Civilian Translator Pleads Guilty to Offering Bribe to Iraqi Police Official," available at *http://www.usdoj.gov/opa/pr/2006/August/06_crm_500.html*.
15. *SEC v. David M. Pillor,* SEC Litigation Release No. 19803 (Aug. 15, 2006), available at *http://www.sec.gov/litigation/litreleases/2006/lr19803.htm*.
16. *United States v. Yaw Osei Amoako* (No. 05-4284 (GEB)) (D.N.J. Sept. 6, 2006); US Department of Justice, "Former Regional Director of ITXC Corp Pleads Guilty in Foreign Bribery Scheme," available at *http://www.usdoj.gov/opa/pr/2006/September/06_crm_595.html.*
17. *SEC v. Jim Bob Brown,* SEC Litigation Release No. 19832 (Sept. 14, 2006), available at *http://www.sec.gov/litigation/litreleases/2006/lr19832.htm*.
18. *United States v. James H. Giffen,* 473 F.3d 30 (2d. Cir. 2006).
19. *Id.* at 34, 43–44.
20. *United States v. Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton* (Cr. No. 05-518) (S.D.N.Y. Oct. 6, 2005).
21. *SEC v. Steven Ott and Michael Young* (Case No. 3:06-cv-04195) (D.N.J. Sept. 6, 2006); SEC Litigation Release No. 19821 (Sept. 6, 2006), available at *http://www.sec.gov/litigation/litreleases/2006/lr19821.htm*.
22. *SEC v. Yaw Osei Amoako* (Case No. 3:05-mj-01122-JJH) (D.N.J. Sept. 1, 2005); SEC Litigation Release No. 19356 (Sept. 1, 2005), available at *http://www.sec.gov/litigation/litreleases/lr19356.htm*.
23. *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002).
24. *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).
25. DOJ FCPA Review Procedure Release 06-01 (Oct. 16, 2006).
26. *See supra* n.7.
27. *Id.*
28. *Id.*
29. *See supra* n.10.
30. *See supra* n.9.
31. *See supra* n.7.
32. US Department of Justice, "U.S. Resolves Probe Against Oil Company that Bribed Iranian Official," available at *http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html* (Oct. 13, 2006).
33. *In re Immucor Inc*., No. 1:05-CV-2276-WSD, 2006 WL 3000133 (N.D. Ga. Oct. 4, 2006).
34. United Nations Convention Against Corruption, 2003, at *http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf*.
35. *See supra* n.7.
36. *Id.*

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