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Panel on Domestic / International Initiatives

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SYMPOSIUM 2004: COMBATTING CORRUPTION

PANEL ON DOMESTIC/INTERNATIONAL INITIATIVES

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1. THE FOREIGN CORRUPT PRACTICES ACT (FCPA)

Background and Significance of the Act

As a result of SEC investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ranged from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called “grease” or facilitating payments that were allegedly made to ensure that government functionaries discharged certain ministerial or clerical duties. The Watergate investigation, uncovered that some of this money was also finding its way back into the US in the form of political campaign contribution. Congress enacted the FCPA in 1977 to restore public confidence in the integrity of the American business system and to bring a halt the bribery of foreign officials.

The FCPA has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subjects of criminal and civil enforcement actions, resulting in large fines, suspension and debarment from federal procurement contracting. Their employees and officers have gone to jail. The FCPA imposes serious penalties on US companies that bribe foreign government officials in order to get business or fail to maintain internal controls and accounting systems that deter employees from creating slush funds to finance company bribes.

The consequences of violating the FCPA can be severe. IBM fired the top executives of its Argentine subsidiary in 1995, after allegations where publicized that it paid $6 million in bribes. In 1995, Lockheed paid nearly $25 million in fines for improper payments to contractors in Egypt and, for the first time, a businessman was sentenced to jail for violating the act. In 1997, the SEC pursued its first FCPA charges in eleven years by enjoining Triton Energy Corp. from doing business and fining it for improper payments in Indonesia .To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation that amended the FCPA in 1998.

The two key provisions of the act are the accounting provisions, commonly referred to as the books and records provisions and the anti-bribery provisions. The FCPA requires companies whose securities are listed in the United States to meet its accounting provisions (15 U.S.C. § 78m). These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take part in any act in furtherance of such a corrupt payment while in the United States.

Permissible Payments and Affirmative Defenses

The FCPA does not prohibit all payments to foreign officials. The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

Facilitating Payments for Routine Governmental Actions

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery;

providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. "Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.

Affirmative Defenses

A person charged with a violation of the FCPA's antibribery provisions may assert that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating that the payments did not constitute this type of payment.

Implications of the Sarbanes-Oxley Act of 2002

The enactment of the Sarbanes-Oxley Act (SOX) in July of 2002 in response to highly publicized corporate governance scandals, imposed additional obligations on public companies on top of the FCPA's record keeping and internal control requirements. The SOX provisions affect reporting, accounting, disclosure and other corporate governance policies and focuses heavily on the internal control policies of an organization. The Act governs not only all the publicly traded firms that list their stock on any US-based financial exchange, but also any firm, irrespective of their place of origin as long as they trade their stocks in the United States.

Considered as the most stringent corporate governance policy so far, the intention of the Act is to help restore public trust in US business and corporate reporting. Some of the Sarbanes-Oxley Act's compliance requirements include:

- Disclose all financial and non-financial reports.
- Public certification of financial reports and internal controls by the CEO and CFO.
- Update investors with all the latest changes inside the organization, both financial and non-financial.
- Report company securities trading within two business days.
- CEOs, CFOs must certify that they are responsible for establishing and maintaining disclosure controls and procedures.
- Engage independent and preeminent legal counsel and a registered public accounting firm.
- Elect a professionally competent Board of Directors that is truly independent, psychologically as well as legally.
- Attract and retain a loyal foundation of shareholders.

The SOX has criminal penalties for those who destroy records, commit securities fraud and fail to report fraud, while providing protection for the whistleblowers. Failure to maintain all audits or review papers for at least 5 years may result in jail terms of 10 years. Penalties may again go up to 20 years for destroying documents in a federal or bankruptcy investigation while penalty for securities fraud is 25 years. A CEO or CFO found to have knowingly certified non-complying financials can be fined up to $1 million and imprisoned for 10 years

Certifications, Internal and Disclosure Controls

Sarbanes-Oxley requires certain certifications by chief executive officers of certain public companies that the company's books and records are accurate and the company's internal controls are adequate, and directs the SEC to promulgate rules for disclosures of management's assessment of the internal controls.

Section 302 of the Sarbanes-Oxley Act outlines the corporate responsibility for financial reports and the SEC has issued guidance to implement the act. As adopted, SEC Rules 13a-14 and 15d-14 require an issuer's principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, to certify in each quarterly and annual report, that:

He or she and the other certifying officers:

- Are responsible for establishing and maintaining "disclosure controls and procedures" (a newly-defined term reflecting the concept of controls and procedures related to disclosure embodied in Section 302(a)(4) of the Act) for the issuer.

- Have designed such disclosure controls and procedures to ensure that material information is made known to them, particularly during the period in which the periodic report is being prepared.

- Have evaluated the effectiveness of the issuer's disclosure controls and procedures as of the end of the period covered by the quarterly or annual report.

- Have presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on the required evaluation as of that date;

He or she and the other certifying officers have disclosed to the issuer's auditors and to the audit committee of the board of directors (or persons fulfilling the equivalent function):

- All significant deficiencies in the design or operation of internal controls (a pre-existing term relating to internal controls regarding financial reporting) which could adversely affect the issuer's ability to record, process, summarize and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls.

- Any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls.

- Whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Section 404 of the Sarbanes-Oxley Act of 2002 directs the Securities and Exchange Commission to adopt rules requiring each annual report of a company, other than a registered investment company, to contain a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and management's assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal control structure and procedures for financial reporting. Section 404 also requires the company's independent auditor to attest to and report on management's assessment of the effectiveness of the company's internal controls and procedures for financial reporting in accordance with standards established by the Public Company Accounting Oversight Board.

To implement Section 404, the SEC adopted rules concerning management's report on its assessment of internal control over financial reporting, the independent auditor's report concerning management's assessment, and management certifications of disclosures in periodic Exchange Act reports. The SEC agreed to use the term "internal control over financial reporting" in the regulations that implement Section 404 and the revisions to Section 302 certification requirements and forms of certification.

The SEC final rules define "internal control over financial reporting" as:

> A process designed by, or under the supervision of, the registrant's principal executive and principal financial officers, or persons performing similar functions, and effected by the registrant's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:
>
> (1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the registrant;
>
> (2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the registrant are being made only in accordance with authorizations of management and directors of the registrant; and
>
> (3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the registrant's assets that could have a material effect on the financial statements.

Exchange Act Rule 13a-15(d) defines "disclosure controls and procedures" to mean controls and procedures of a company that are designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms. The definition further states that disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that the information required to be disclosed by a company in the reports that it files or submits under the Exchange Act is accumulated and communicated to the company's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

In adopting this criteria, the SEC considered that these definitions will be used for purposes of public management reporting, and that the companies that will be subject to the requirements of Sections 302 and 404, also are subject to the FCPA requirements.

2. MULTILATERAL INITIATIVES

From early 1994 through early 2001, the United States Government[1] learned of significant allegations of bribery by foreign firms in over 400 competitions for international contracts valued at $200 billion. The practice is global in scope, with firms from over 50 countries implicated in offering bribes for contracts in over 100 buyer countries during the seven-year period. In addition, between May 1, 2002, and April 30, 2003, the competition for 40 contracts worth $23 billion might have been affected by bribery by foreign firms of foreign officials

The international business community's anti-corruption efforts are essential parts of broader systems for fighting corrupt business practices.

[1] U.S. Department of Commerce, International Trade Administration-Fifth Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998. July 2003

These also include formal law enforcement, where an appropriate regulatory framework is already in place, and regulatory and other public sector reform, where it is not.

2.1 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, established by the governments of developed countries, is regarded as one of the most important instruments in the fight against corruption. This Convention obligates all of the developed countries whose companies are the major international competitors of US companies.

On November 21, 1997, the 29 member nations of the OECD and five non-member nations adopted the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions." The OECD Convention, which was signed on December 17, 1997, and ratified by the U.S. Senate on July 1, 1998, sets forth the essential elements of a foreign corrupt practices statute that each signatory county is obligated to enact into law. All signatories to the convention also agreed to implement the Revised Recommendation that includes the elimination of the tax deductibility of bribes.

The Convention entered into force in 1999, and as of July 2003, all of the convention's 35 signatories had laws on their books making it a crime to bribe a foreign public official. The 30 current member states of the OECD are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, the Slovak Republic, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. In addition to these countries, Argentina, Brazil, Bulgaria, Chile, and Slovenia are signatories to the Convention. Slovenia became the 35th signatory to the convention in November 2001.

The convention obligates the parties to criminalize bribery of foreign public officials in the conduct of international business. It proscribes the activities of those who offer, promise, or pay a bribe. For this reason, the Antibribery Convention is often characterized as a "supply side" agreement, as it seeks to affect the conduct of companies in exporting nations.

The OECD Convention is relatively narrow and specific in its scope. Its sole focus is the use of domestic law to criminalize the bribery of foreign public officials. It focuses on "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. It does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

US Government Concerns

According to the Fifth Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition issued by Department of Commerce in July 2003, the US Government expressed certain concerns regarding the implementation and enforcement of the Convention. The following issues, among others, were included in the Report:

- The Convention does not prohibit the bribery of political parties, party officials, and candidates for office that may create a loophole through which bribes may be directed at the present time and in the future. Although no such loophole exists in the FCPA, the US experience shows that firms do attempt to obtain or retain business with bribes of this nature. Press accounts continue to indicate that corporations based in countries that are parties to the convention may still attempt to use this mode of bribery to obtain or retain business in foreign markets.

- Although several countries have stated that they would make bribery of foreign public officials a predicate offense for their respective money-laundering legislation, irrespective of whether their systems made domestic bribery of public officials a predicate, no agreement has been reached to expand the scope of the convention to explicitly cover any of these matters.

- As of July 7, 2003, there has yet to be a single foreign prosecution under national legislation enacted to implement the OECD Convention. The U.S. government believes that the focus of the OECD Working Group on Bribery and parties to the Convention should be on enforcement of the convention. Companies based in countries that do not prosecute may continue to bribe with impunity, recognizing that the political will or the technical capacity does not exist at home to investigate their actions.

OECD Convention Impact on U.S. Companies

The Convention has particular significance for all U.S. businesses that operate internationally in the signatory countries. Upon their ratification of the OECD Convention, the signatory nations have each adopted implementing legislation. The enacting of different laws in multiple jurisdictions will likely result in U.S. companies being subject to varying anti-bribery and accounting compliance standards.

For example, under the FCPA, a U.S. director of a foreign-organized subsidiary of a U.S. company may properly authorize the subsidiary to make a facilitating payment to obtain a customs clearance in the Federal Republic of Germany. However, German law implementing the OECD Convention does not provide for a facilitating payment exception to its anti-bribery provisions. Similarly, while under the FCPA the U.S.-resident director would be prohibited from making a payment to a German political party official, German law implementing the OECD Convention may permit payments to political parties and their officials.

Also, the ratification of the OECD Convention and subsequent adoption of implementing legislation by signatory nations allows prosecution for books and records violations not only by the SEC, but also by foreign government entities. As a result, U.S. companies need to monitor the accounting requirements of foreign countries where their foreign-organized entities operate, understand the related enforcement regimes, and conform the practices and policies of their foreign-organized entities to the most stringent applicable standards (most likely U.S. standards).

Other Significant International Initiatives

2.2 United Nations Convention Against Corruption

The UN Convention Against Corruption was signed by 96 countries, including the United States, at a high-level signing conference in December 2003 in Merida, Mexico. It is the first legally binding multilateral treaty to address on a global level the problems relating to corruption. It makes the prohibition of corruption an integral part of the international public order.

The instrument provides a comprehensive framework for dealing with corruption in the public sector and in the private sector — this is particularly important for countries not covered by regional conventions. The Convention provisions include, among other things, the following:

- It expands on the provisions of existing regional anti-corruption instruments to prevent corruption and provides channels for governments to recover assets that have been illicitly acquired by corrupt former officials.

- It provides for the criminalization of certain corruption-related activities such as bribery and money laundering, and for the provision of mutual legal assistance related to those activities.

- It requires parties to institute a comprehensive domestic regulatory and supervisory regime for banks and financial institutions to deter and detect money laundering.

- That regime must emphasize requirements for customer identification, record keeping, and reporting of suspicious transactions.

- It prohibits the extortion by public officials and complements the OECD Convention's efforts to prohibit companies from bribing foreign officials.

- It addresses serious shortcomings in mutual legal assistance and asset recovery, two key tools for combating international corruption that can only be strengthened through comprehensive worldwide efforts.

2.3 The Inter-American Convention against Corruption

The Inter-American Convention against Corruption (IACC) is the first international convention against corruption ever adopted. It entered into force on March 6, 1997 and has been ratified by 29 countries. The IACC provisions can be broadly classified into three groups: Preventive Measures; Criminal Offenses; and Mutual Legal Assistance.

The IACC requires, among other things, that signatories:

- Criminalize the bribery of foreign officials and update domestic legislation to criminalize specific corrupt acts.

- Assist each other in criminal investigations and prosecutions.

- Provide for the extradition to other signatory countries of persons charged with violations of laws prohibiting the bribery of foreign officials.

2.4 The European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States

This Convention stems from an attempt on the part of the European Union to address forms of malfeasance that are harmful to its own financial interests. It only deals with conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offenses, which Member States are required to criminalize. It does not deal with fraud, money laundering, or other corruption-related offenses.